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THE PACKERS' CONSENT DECREE

A HISTORY OF LEGISLATION PERTAINING TO THE MEAT PACKERS LEADING UP TO THE PACKERS' CONSENT DECREE OF 1920 AND SUBSEQUENT THERETO, WITH A SUMMARY OF THE VARIOUS COURT DECISIONS GROWING OUT OF THE CONSENT DECREE, INCLUDING THE DECISION OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, JANUARY, 1931, MODIFYING THE DECREE

PRESENTED BY MR. BROCK

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Compiled by

HUGH G. GRANT

Former Member of Faculty Alabama Polytechnic Institute, Auburn, Alabama

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THE PACKERS' CONSENT DECREE

I. INTRODUCTION

On February 27, 1920, the Attorney General of the United States, filed in the Supreme Court of the District of Columbia a bill in equity seeking injunctive relief under the Sherman Act of 1890 (26 Stat. sig.) and the Clayton Act of 1914 (38 Stat. 730) against five packers, namely, Swift & Co., Armour & Co., Morris & Co., Wilson & Co., and the Cudahy Packing Co., et al. The suit was concluded the same day by entry of the consent decree which prohibited the defendants from doing certain acts regarded as inimical to the public interests. These acts are summarized as follows:

1. From continuing to hold capital stock in public stockyards, market companies, terminal railroads, and market journals.
2. From handling or dealing in a list of specified commodities unrelated to the meat-packing industry.
3. From operating retail meat markets except for employees.
4. From handling fresh milk or cream except for manufacture into certain specified food products.

The entering of the consent decree marked the culmination of an agitation involving the meat business which antedates the passage of the Sherman antitrust law of 1890. It was also the beginning of a legal controversy which is without parallel in the court records of this country. The ink was scarcely dry on the consent decree before legal maneuvers were being formulated by attorneys for the defendant packers for the purpose of getting out from under the admittedly binding terms of the consent decree. It has been charged that the packers consented to the decree to prevent the passage of threatened legislation adversely affecting their activities. Regardless of the truth or untruth of this allegation it is certain that the packers have been most persistent in seeking to abrogate the decree to which they voluntarily consented in 1920. There has been legal warfare now for 10 years between these packers and the wholesale grocers of the Nation who have constituted the "shock troops" of the Government in the latter's efforts to retain the decree. The litigation has already reached the Supreme Court of the United States where the packers were defeated in their efforts to annul the decree. The detailed account of litigation is given in a later chapter.

The trial of the case on petition to modify the decree filed by attorneys for the packers in the summer of 1930 was concluded early in December, 1930, in the Supreme Court of the District of Columbia. (In Equity No. 37623, United States of America, plaintiff, *v.* Swift & Co. et al., defendants.)

Should the court grant the petition to modify the consent decree, it is quite likely that tremendous echoes of the controversy will be heard in the halls of Congress. It is a striking coincidence that it was a

Senate investigation of the dressed beef industry back in the late eighties that led to the passage of the Sherman Act in 1890, in accordance with which the consent decree was promulgated by the Government and subsequently entered in 1920.

Obviously the outcome of the legal battle over the proposed modification of the consent decree is of the greatest importance to the four great meat packing concerns—i. e., Swift, Armour, Wilson, and Cudahy—and their subsidiaries, as well as to the independent packers, some 6,000 wholesale grocers, and approximately 300,000 retailers of food, including a host of chain grocery systems. The decision of the court is of vastly more concern to the 120,000,000 consumers of the United States who pay the bills for the food products manufactured and distributed by these companies.

II. ORGANIZATION AND DEVELOPMENT OF THE PACKERS

In order to understand the significance of the agitation relating to the proposed modification of the packers' consent decree, it is appropriate to touch briefly upon the organization and development of the meat-packing business which at the time of the Federal Trade Commission investigation in 1918 was dominated by five great concerns, Swift & Co., Armour & Co., Morris & Co., Wilson & Co., and Cudahy Packing Co. Morris & Co. was subsequently absorbed by Armour, resulting in the organization of the so-called Big Four.[1]

These packers and their numerous subsidiaries have dominated the meat business in the United States for a period of nearly 45 years, and to-day, if one is to accept the allegations of the wholesale grocers and others, will control the entire food supply of the Nation within the near future unless checked by such legal prohibition as the consent decree of 1920.

The four big packers all began operations as individual enterprises with small capital, and with the exception of Wilson & Co., have been under the management of the same families which established them for more than two generations. Armour has always been a close corporation with stocks largely in the hands of the Armour family. The Morris family control Morris & Co.; Cudahy Packing Co. is dominated by the Cudahy family, and Swift & Co., although having some 20,000 stockholders, as advertised, has been completely controlled by the Swifts. Wilson & Co., successors to Sulzberger & Sons Co., has a large number of stockholders, but the absolute control is vested in one of the Wilsons and a few New York bankers.[2]

Furthermore the Big Four, according to evidence deduced by the Federal Trade Commission which conducted an exhaustive investigation of the meat-packing industry in 1917–18 by direction of President Wilson, are bound together by joint ownership of a large number of companies, estimated to be 108 at the time of the investigation. The list included the following 15 types of concerns: Service companies, land development, stockyard, cattle loan, rendering, cotton oil, terminal railroads and facilities at stockyards, packers' machinery supplies, cold-storage warehouses, slaughtering companies, railroads, canning companies, banks, publications, miscellaneous.[3]

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[1] Mathews Financial Analyst, Packers' Eyes on Retail Meat Chain Outlets.
[2] The Federal Trade Commission, Report on the Meat Packing Industry, Summary and Part I, 1919, p. 45.
[3] Ibid, pp. 46–47.

The growth of the principal packing companies has been phenomenal, especially during the last two decades. From the one slaughtering plant owned in 1857 by Swartzschild and Sulzberger, predecessor of Wilson & Co., the number of plants owned by the group had increased to 20 in 1897, 57 in 1907, and 91 in 1917. In 1884 there were two branch wholesale houses or markets operated by Armour; in 1912 there were 591; and in 1917, 1,120; of which nearly half were owned by Armour and Swift. In other words 89 per cent of the branch houses in the United States were operated by the five big packing concerns in 1917.[4] The branch houses investment in November, 1918, amounted tc $240,052,434. Of this sum Armour held over $198,225,023 and Swift $82,669,274.[5]

In 1929 the wholesale slaughtering and meat-packing industry (not including small plants slaughtering direct for retail trade) ranked second among the manufacturing industries of the United Sates when measured by gross value of its products. The production of meat in federally inspected plants in 1928 was 11,317,000,000 pounds.[6] At the time of the Federal Trade Commission investigation the Big Five had a total capitalization of $243,000,000 and controlled over 60 per cent of the interstate livestock slaughter.

The multifarious activities of the big packing companies as revealed by the commission's investigation was another indication of the vast magnitude of the industry. For instance, it was estimated that the five packers in 1917 handled half the poultry, eggs, and cheese in the main channels of interstate commerce. Swift handled 50,000,000 pounds of butter, half of which it manufactured, and four of the big companies owned 56 creameries and controlled many others. The packers had also become important distributors of canned fruits, vegetables, fish, milk, and groceries. By the terms of the packers' consent decree of 1920 the companies were directed to withdraw from the grocery business and from lines of activity held to be unrelated to meat packing. The Big Five has also engaged heavily in the fertilizer business and has held stock in numerous banks and cattle loan companies. These activities were carried on by hundreds of different corporations all closely tied in with the five parent organizations. In November, 1918, the five packers had a combined wealth estimated at $555,000,000. An important control of foreign-meat trade reaching into South America and European ports was long ago established.[7]

The meat-packing business as organized by the four big packers consists of three major activities, namely:

(1) Purchase of livestock, such as sheep, cattle, and hogs.
(2) Conversion of livestock into salable products.
(3) Distribution of these products.

The stock cars and the stockyards are two important factors in the purchase of livestock by the packers. The packers own only a small number of stock cars while they exercise a wide control over the stock-

[4] Virtue, G. C., The Meat Packing Investigation, in Quarterly Journal of Economics, No. 34, 1919–20, p. 633.
[5] The Federal Trade Commission, op. cit., Part IV, p. 33.
[6] U. S. Department of Commerce Yearbook, 1929, Vol. I, pp. 254–259.
[7] Federal Trade Commission, op. cit., Summary and Part I, pp. 90–94.

yards, enabling them to buy advantageously, it is claimed. Three factors are involved in (2), the conversion of livestock, namely:

(*a*) Organization.
(*b*) Finance.
(*c*) Operation.

In general the organization of each of the big packers is similar and the action of all is concerted. The financial practices of each of the packers and the industrial integration they form serves to command large capital and credit. The operation of the business is a highly developed process of conversion of raw material into finished products. The minute utilization of livestock has resulted in the absorption of varied lines of industry wholly unrelated to the meat business.

Rapid and easy distribution of products of livestock is a most important factor in the meat industry. Success had been attained by the refrigerator car, the "peddler" car, and by the branch house. The refrigerator car, dating from 1871, and privately owned and operated by the packers, has been the greatest single factor in the enormous expansion of the meat-packing business in the United States and throughout the world during the past 50 years. Of 16,875 beef cars in the United States (those fitted with brine tanks for frozen meats) 15,454 belonged to the five big packers, 1,146 were owned by other interstate packers, and 275 by other interests at the time of the investigation. The "peddler" car has carried meat products into practically every nook and corner of the Nation. Great fleets of these cars cover the continent hauling both meat and other perishables. J. Ogden Armour gives to his father the credit for the development of the refrigerator car for fruit, berry, and produce business. It is a romantic story of initiative and enterprise.[8]

Finally the branch house, the receiving agency for the products of the packers, occupies a commanding position in the organization of the industry. There is only one step left in the scheme, that of retailer to consumer, and if the packers' consent decree should be modified as requested this will be eliminated, and there will be an unbroken chain of packer manufacture at the plant, and packer distribution direct to the breakfast table of the consumer. The wholesale grocers and many retailers throughout the Nation who fear the extension of the chain-store system say that this plan if brought into effect will not only force them out of business but that it will be highly prejudicial to the consuming public through the establishment of a monopoly with subsequent monopoly prices. On the other hand the great packers claim that the system will be far more efficient and will serve to reduce cost to the consumer by the elimination of a middleman.

III. EARLY HISTORY OF MEAT PACKER COMBINATIONS

A. PERIOD OF DRESSED MEAT POOLS (1885–1902)

The first public record of an official inquiry into the relations of the great meat packing concerns of the United States is contained in a Senate joint resolution which was adopted on May 16, 1888. Under

[8] Armour, J. Ogden, The Packers, the Private Car Lines and the People, pp. 37–38.

this resolution a committee of five Senators was appointed by the President of the Senate—

> to examine fully all questions touching the meat product of the United States; and especially as to transportation of beef and beef cattle; and the sale of the same in the cattle markets, stockyards, and cities; and whether there exists or has existed any combination of any kind, either on the part of the Trunk Line Association or the Central Trade Association, or other agencies of transportation or on the part of those engaged in buying and shipping meat products, by reason of which prices of beef and beef cattle have been so controlled or affected as to diminish the price paid the producer without lessening the cost of meat to the consumer.[1]

This committee headed by Senator Vest, of Missouri, held its initial meeting at St. Louis on November 20, 1888, and proceeded to take testimony from representatives of the International Cattle Range Association and the Butchers National Protective Association. Despite internal conflicts as to policy among the membership of these two groups there was unanimity of thought on the fundamental fact that while there was a very decided depression in the prices paid to the producers of cattle that the price of meat to the consumer remained as high as before. It was brought out that market prices for cattle commenced declining in 1885, the selling price of the best grade of beef dropping from $7.15 per hundred pounds at Chicago in 1884 to $5.40 in 1889.[2]

Another fact gleaned by the committee and upon which there was agreement was that during the 10-year period beginning about 1878 the method of selling beef cattle had been entirely revolutionized resulting in a concentration of the market at a few large centers, namely Chicago (the principal point) Kansas City, Omaha, St. Louis, Cincinnati, and Pittsburgh. In other words, the whole system in vogue prior to 1878 under which the shipper and the butcher went from one cattle raiser to another, competing in the purchase of cattle, had been almost entirely eliminated by the year 1888. This revolution, it was developed, was largely the result of the construction of railroads and the subsequent combination between these corporations and the stockyard people, as well as by the ability of a few men, chiefly of Chicago, to control enormous capital resources. For instance, the committee developed the fact that by the so-called Evener combination, which began in 1873, three great trunk line railroads, the Pennsylvania, the New York Central, and Erie, agreed to charge $115 for each carload of cattle shipped from Chicago to New York and to allow certain shippers in Chicago designated "Eveners" a rebate of $15 per car. This resulted in the destruction of the St. Louis cattle market and the great development of the Chicago market as revealed in the number of cattle received at the Union Stockyards in Chicago—393,007 in 1866 as compared with 1,096,745 in 1876.[3] The three great railroads monopolized the entire cattle transportation from Chicago to New York, amounting to 4,000,000 cattle, between 1871 and 1879.

The Senate committee developed the further fact that the dressed-beef business, which became important in 1878 with the advent of the refrigerator car, as early as 1888 was practically controlled by four great Chicago concerns, namely, Armour & Co., Swift & Co., S. W.

[1] U. S. Senate, Report on Transportation and Sale of Meat Products, No. 829, 51st Cong., 1st sess., p. 1.
[2] U. S. Senate, op. cit., p. 1.
[3] U. S. Senate, op. cit., p. 3.

Allerton, and Hammond & Co., Armour and Swift being by far the largest.

These "charter members" formed the "Allerton pool," so named because the business of the pool was held in the office of Packer Allerton. This pool decided upon the quantity of meat to be shipped by each member.[4] It was a rather crude set-up and was not particularly effective since the territory at that time was not extensively elaborated. The control of the cattle market was absolutely within the grasp of these four companies if they chose to assume such control, and there was much evasion on the part of witnesses, many of whom, being cattle men dependent for a livelihood upon maintaining the good will of the packers, were reluctant to give the facts, it was charged as result of the committee probe. The four great packing concerns, it was brought out, had an agreement not to compete with each other in the purchase of cattle.

It was significant according to the committee report that the principal owners and agents of the dressed-beef establishments refused to obey the summons of the Senate committee to appear and testify, although subsequently Mr. P. D. Armour of Armour & Co., obeyed a subpœna to appear before the committee in Washington. Mr. Armour testified that there was no agreement between the packers relating to the purchase of cattle, but in rebuttal the committee secured an admission from the witness that he was not entirely familiar with all of the vast activities of his army of agents. Mr. Armour ascribed overproduction and overmarketing of cattle, especially range or southwestern cattle, as the chief cause of the decline in the price of cattle to the producers.[5]

As a result of its investigation the Senate committee reached the conclusion that the four big packers:

(1) Combined to fix the price of beef to purchasers and consumers by artificial and abnormal centralization of markets.

(2) Refused to interfere with each other in certain markets and localities in the sale of meat.

(3) Acted together in supplying meat to certain public institutions.

(4) Combined in opening shops and underselling the butchers at Detroit and other places in Michigan and at Pittsburgh in order to force them to purchase dressed beef.

(5) Combined in refusing to sell any meat to butchers in Washington, D. C., because the butchers had bid against them for contracts to supply the Government institutions with meats.

(6) Acted jointly in Chicago in conspiring to refuse to give testimony to Senate committee.

(7) Received the bulk of the profit accruing from the depressed prices paid to the producers of cattle.

The committee declared as fallacious Armour's arguments as to overproduction in view of the large annual increase of population, and they also discounted his further argument of over marketing on the basis of statistics of cattle compiled at the great stockyards.[6]

Summarizing, the committee declared that there was convincing proof of collusion with regard to (*a*) fixing of beef prices (*b*) division of

[4] Federal Trade Commission, op. cit., Pt. II, p. 13.
[5] U. S. Senate op. cit., pp. 431–434.
[6] U. S. Senate, op. cit., pp. 6–11.

territory in business; (c) division of certain public contracts; (d) compulsion of retailers to buy their beef from the packers.[7]

The Senate committee cited as a remedy for the alleged beef industry combination the application of the law which had passed the Senate and was then pending in the House of Representatives, later known as the Sherman antitrust law, and admonished the State governments to enact laws to punish these combines operating within the State lines.[8]

While describing a situation held to be menacing to the cattle producers as a result of the alleged greedy combinations of dressed packers and the rebating railroad companies, the Senate committee paused to strike a note of optimism, as indicated by the following statement which was placed in the Senate records along with the detailed summary of the testimony of witnesses:

> A little reflection will satisfy every intelligent man that no combination can keep the prices of beef cattle at present quotations. The population of the country is increasing in a wonderful ratio, and of course the increase is greater each year. The foreign demand for American beef is annually growing and it can be only a short time until our store cattle will be admitted into the United Kingdom * * * . Besides the cattle-growing region in the West is rapidly becoming limited. The admission of new States, and the settlement of agricultural lands, the quantity of which is enlarged by systematic irrigation, must necessarily decrease the grazing area. While this is so, there will be an increased demand for beef with increased population * * * . It is impossible that the Chicago market should continue to control the cattle interest of the whole country as it does now, or that a few large operators shall retain their hold upon that market.

In other words the venerable Senators comprising the special investigation committee, fell back upon the doctrine of Laissez Faire which had its origin during the early part of the nineteenth century. A dangerous combination existed, the Senators admitted, but nevertheless everything would work out all right for the cattle men and the consumers in the end through natural economic forces.

This picture drawn in conclusion by the Senators must have been comforting to Messrs. Armour, Swift, et al. The solution offered—a trust bill not yet enacted into law, and reliance upon future State legislation—certainly should not have been disturbing to any individual or group bent upon extension of their business through control and power.

The Sherman anti-trust act was placed upon the statute books on July 2, 1890. The Senate investigation of the dressed-beef business may be said to be partly responsible for this law. It is appropriate therefore to sketch here very briefly the scope of this famous act about which so much has been said and written. In general this law—

> prohibited every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, and every monopoly or attempt to monopolize.[10]

Specifically, according to later decision, the Sherman law was (1) adopted to prevent all kinds of contracts or combinations which directly or hurtfully restrain trade or commerce subject to Federal control, or monopolize or attempt to monopolize, and (2) no twilight zone was left which could not be reached either by Federal or State

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[7] U. S. Senate, op. cit., p. 446.
[8] U. S. Senate, op. cit., p. 33.
[9] Ibid., p. 33.
[10] Jones, Eliot, The Trust Problem in the United States, p. 23.

law as result of established interstate commerce jurisdiction, and (3) combination of persons in whatever walks of life insofar as they are engaged in such commerce are within the scope of its provisions and in particular combination of manufacturers engaged in such commerce are comprehended by the law.[11] How was this law going to affect the so-called Beef Trust?

Notwithstanding the results of the Senate investigation and the apparent comprehensiveness of the Sherman law as it would seem to relate to the meat-packing business, it appears from subsequent official investigations by the court and by the Federal Trade Commission that the "dressed meat pools" combinations were continued and increased in scope. Testimony under oath of Henry Veeder, son of the attorney for Swift & Co. and secretary for a group of beef packers comprising Armour & Co., Armour Packing Co., Cudahy, Hammond, East St. Louis Dressed Beef & Provision Co., Morris & Co., and Swift & Co. show that representatives of these companies during the period 1893–1896 met every week in a suite leased by Veeder. At these meetings the territory was divided, volume of business was apportioned upon statistics compiled by Veeder, clearing-house agent for the packers, and penalties were assessed for violations of the allotment agreement. Should this be construed as in restraint of trade? The packers admitted such a combination under the so-called "Veeder pool." [12]

Under this plan Armour & Co. was known as "A," Armour Packing Co. as "B," Cudahy Packing Co. as "C," Hammond Packing Co. as "D," St. Louis Dressed Beef & Provision Co. as "E," Morris & Co. as "F," Swift & Co. as "G." Subsequently Schwarzschild & Sulzberger were designated as "G," and Swift as "H." The country was divided into sales territory, known as "A," "B," "C," etc. The system also called for two statements from each packer each week. One statement, the "shipment statement," showing the total amount of shipments by the packer into certain territory, "A," for instance; and, the second, a "margin statement" giving the closed selling prices received by the party in this territory during the same week. These statements served as a basis for adjusting the proportion of shipments and expenses as well as for assessment of fines for overshipment. There was also a "percentage" statement which was sent to the head of the beef department of each company each week. This referred to the total percentage of beef to be shipped into a given territory by a packer.[13]

While regular meetings of the packers' representatives were dispensed with from May, 1896, to January, 1897, Secretary Veeder continued in the employ of the packing interests and conducted a beef-statistical bureau. In the early part of 1898 a new pool was organized, the firm of Schwarzschild & Sulzberger being admitted to membership in place of the East St. Louis Dressed Beef Co., which Morris & Co. had absorbed. The outstanding feature of this pool was the increase of penalities for overshipment and the employment of auditors to check on the statements submitted to Veeder by the individual packer.[14] Apparently the members of the combination

[11] U. S. Department of Commerce, Trust Laws and Unfair Competition, by Davies, Joseph E., 1916, p. 52.
[12] Virtue, op. cit., p. 657.
[13] Federal Trade Commission, op. cit., Pt. II, pp. 14-15.
[14] Ibid., p. 47.

were distrustful of each other and acted on the theory that it "takes a thief to catch a thief."

The Veeder pool system made it possible for the packer members to extend their control over the fresh-meat business in the principal markets of the United States, it is claimed. The munipulation, according to the Federal investigators, was brought about by a uniform method of figuring cost, which was given out by their salesmen as the cost of meat. If a change in some item of cost was made one day by one company, on that same day or soon thereafter the same change, or another of corresponding amount, was made by the other parties to the agreement. At first the quotas of shipments for each member were made upon the basis of the business of the preceding week, but later a certain figure, termed "fully capacity" was established with reference to the different markets and territories.

This Veeder pool continued until May, 1902, when the Department of Justice, following agitation in the newspapers and in the Congress, filed charges of conspiracy and asked the court for an injunction. It is significant that the agitation came at a time of declining prices of cattle and high prices to the consumer.[15] It is pointed out as significant also that Veeder as alleged destroyed all letters and memoranda which had been kept by the pool since 1902.

In their statement in reply to the findings of the Federal Trade Commission, Swift & Co. admitted the existence of the "beef pool" and defended the system in the following language:

> The arrangement whereby the quantity of beef could be shipped by each packer to various large eastern markets was discontinued in 1902. Although public opinion would probably not countenance such arrangements at present, they (the "beef pool") were undoubtedly of benefit to the public at large in that they helped to avoid recurrent gluts and scarcities in eastern markets, and tended to steady prices.[16]

The packers claimed they resorted to these methods in a spirit of keen competition.

B. MERGER PERIOD (1902–1912)

The petition of the Attorney General for an injunction alleged: (1) Restraint of competition in purchase of livestock and the sale of meat, and (2) the monopolization of this commerce, including the securing of railroad rebates for monopoly purposes. Temporary injunction was granted on May 21, 1902; subsequently, on May 26, 1903, the injunction was made perpetual; and on April 11, 1905, it was affirmed with slight modification on appeal by the United States Supreme Court in Swift & Co. *v.* U. S., the court unanimously holding that an illegal combination had been shown; and that the effect of the combination on interstate commerce was direct and not accidental, secondary and not remote.[17] Mr. Justice Holmes delivered the opinion of the court, which directed the five large packing companies, several smaller ones, and a number of individuals not to refrain from bidding against each other in the purchase of livestock, not to conspire to fix uniform prices for the sale of meats and quantities shipped, but to

[15] Walker, Francis, The Beef Trust and the United States Government, in the Economic Journal, No. 16, p. 495.
[16] Swift & Co., Statement on Summary of the Report of the Federal Trade Commission on Meat Packing Industry.
[17] Swift & Co. *v.* U. S, 196. U. S., 375.

fix uniform rules as to credit to dealers and cartage charges, or to demand or receive rebates in any form from the transportation companies.[18]

In the interim, as it was revealed later, while the injunction process lagged in the courts, the three principal members of the old "Veeder pool," namely, Armour & Co., Swift & Co., and Morris & Co., sought to perfect a merger of their interests into one corporation. In fact, within 10 days after the issuance of the injunction a contract to this effect was signed by the "Big Three." It should be noted that Armour & Co. had already absorbed Hammond & Co. Schwarzschild & Sulzberger and Cudahy Packing Co. remained outside of the new deal at the beginning of the negotiations, although they joined a few weeks later. The merger plan involved negotiation of a loan of $90,000,000, which was subsequently reduced to $60,000,000. The banking firm of Kuhn, Loeb & Co. was approached by the packers.

This merger plan failed because of the approaching panic of 1903. A second plan was thereupon formulated, resulting in the establishment of the National Packing Co. as a holding company for taking over the properties of subsidiary companies which had been purchased by Armour, Swift, and Morris as individuals.[19] The National Packing Co. might be destroyed at any time without disturbing the proportionate ownership in the acquired companies. The same system of making the cost of beef seem high that had been used by the "Veeder pool" was now employed by the National Packing Co. The individual companies used an identical method of figuring the test cost. One company, for instance, would add to the live cost of the animal $2.75 for killing charge with deductions for by-products after making exactly the same deductions for hides and fat as all the others and make an additional deduction of 40 cents per head for tongues, while according to the record also, another company would charge $2.75 for killing and make a deduction of 40 cents for offal, but no deduction for tongues, and identically the same deduction as the others for hides and fat.

Close cooperation was also developed among the branch houses as was the case during the "Veeder pool." Representatives of Armour, Swift, and Morris, and the new holding company, the National Packing Co., exchanged margins each week and wired them to headquarters, each reporting his own and those of the others. They also visited one another's coolers to ascertain what stock was on hand and to get a line on prices.[20]

According to Francis J. Heney, attorney for the Federal Trade Commission, the same men who had sat in for years on the "Veeder pool" of 1893–1896 now continued to meet in Veeder's office as members of the board of directors of the National Packing Co. This plan continued for a period of approximately 10 years or until 1912.[21] The holding company was merely a "clearing house" for the combination of packers. Armour, it was shown, owned 40.11 per cent of the stock; Swift, 46.70; and Morris, 13.19 per cent. J. Ogden Armour held 60,160 shares; G. F. Swift, 70,047; and Edward Morris, 19,783. The remaining 10 of the 150,000 were held by the other 10 persons

[18] Virtue, op. cit., p. 657.
[19] Federal Trade Commission op. cit., Pt. II, p. 22.
[20] Ibid., p. 24.
[21] U. S. Senate Hearings, Committee on Agriculture and Forestry, Government Control of the Meat Packing Industry, 65th Cong., 3d sess., Pt. I, 1919, pp. 12-14.

connected with the company. The organization was modeled after the plan of the Steel Corporation, which in 1901 became strictly a holding company trust.[22]

Thus from 1903 until 1917 the five big packers through the "beef pools" and the National Packing Co. dominated the industry, according to the Federal Trade Commission. Through the pool, it was charged, they exercised control over the purchase of raw material and sale of their products, while the National Packing Co., the three principal packers, Armour, Swift, and Morris, could manage their business for competitive purposes as though they were a single corporation. A large number of competitive companies of the nineties and others organized later which had been formed to "fight the trust" had been absorbed by the National Packing Co., it was shown. The close association of the principal companies for 25 years in the pools, and agreements had also resulted in the habit of concerted action of the owners and employees.[23]

In 1911 an indictment was brought in Chicago against the National Packing Co. on the ground that the company "formed the center at the meetings of which in conducting the business of the company, the directors of the company at the same time transacted the business of the other three companies." This is the language of Secretary Veeder on the witness stand. The grand jury sessions and the trial lasted about six months and evidence was introduced to show that the packers were in collusion in purchasing livestock and in fixing prices of meat. Finally in March, 1912, a verdict of "not guilty" was brought in, and under the threat of an injunction suit in the following August the National Packing Co. secured from the Attorney General of the United States approval of a plan for selling its properties to Armour, Swift, and Morris Cos.[24] Although the verdict of the grand jury was regarded as vindication by the packers it was not so regarded by the Federal Trade Commission which quoted from a letter of Mr. Veeder, of "Veeder pool" fame, to the effect that some of the properties turned over to the National Packing Co. had been paid for by checks of the packing companies, and not by their presidents as individuals.[25]

IV. OPERATIONS OF THE PACKERS FROM 1912 TO 1920

A. THE CONTINUANCE OF THE LIVESTOCK POOL

1. PERCENTAGES

The dissolution of the National Packing Co. in 1912 was largely mythical it appears, as far as it affected packer-combination control. This was indicated in a memorandum from Swift & Co., which was discovered by the Federal trade investigators in 1918. The memorandum, showing livestock purchase "percentages" during the transition period and the basic percentages agreed upon as result of the readjustments following the liquidation of the holding company, follows:[1]

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[22] Jones, op. cit , p. 202.
[23] Federal Trade Commission, op. cit., summary and Pt. II, p. 34.
[24] U. S. House Hearings, Committee on Agriculture, Meat Packer Legislation, 66th Cong., 2d sess., Vol. II, (1920), p. 966.
[25] Federal Trade Commission, op. cit., Pt. II, pp. 23–24.
[1] Federal Trade Commission op. cit., Pt. II, p. 35.

MEMORANDUM

Cattle

	1910	1911	1912	1913	1910, arbitrary
1	22.11	21.70	24.11	27.13	27.43
2	27.74	27.28	30.61	34.13	34.08
3	14.70	15.27	16.89	17.72	17.59
4	11.63	11.91	12.43	11.84	11.73
5	14.26	14.11	6.91		
6	9.56	9.73	9.05	9.18	9.17
	100.00	100.00	100.00	100.00	100.00

Sheep

	1910	1911	1912	1913	1910, arbitrary
1	24.20	24.17	26.01	29.09	29.00
2	33.35	33.39	35.52	38.90	38.72
3	12.06	12.44	13.34	13.94	14.56
4	8.15	9.10	9.08	8.20	8.08
5	11.62	10.50	5.35		
6	9.72	10.40	10.70	9.87	9.64
	100.00	100.00	100.00	100.00	100.00

The numerals in the first column represent packing companies as follows:

1. Armour & Co.
2. Swift & Co.
3. Morris & Co.
4. Sulzberger & Sons Co.
5. National Packing Co.
6. Cudahy Packing Co.

The last column headed "1910 Arbitrary" contains the percentages used for the conduct of the livestock pool as result of readjustment in the National Packing liquidation.

Thus the combination among the Big Five packers after the dissolution of their holding company in 1912 apparently took the form of a simple but effective livestock pool under which the purchases of livestock sent to market were made according to definite "percentages" agreed upon for long periods, which were subject to periodic revision as basic conditions changed. This division of the purchase of livestock served to regulate the volume of business of the packers and also to insure uniformity of prices paid for livestock and therefore the prices at which dressed meats were sold—a very definite system to regulate purchases of livestock and sales of meat.[2]

(*a*) *The Black Book.*—The famous "Black Book" memoranda, covering the period of January 29, 1913, to January 29, 1916, written by G. F. Sulzberger, vice president of Sulzberger & Co., who attended the meetings and made notes, revealed the peculiar methods used. For instance the packers' records show that there were code symbols—"Black," meaning Tilden; "Sanford," meaning J. Ogden Armour; "H," meaning Swift; "Klee," meaning the Morris interests, represented by Thomas Wilson, president; and "Williams,"

[2] Jones, Eliot, "Document, Reports, and Legislation" in American Economic Review, No. 9, p. 819.

meaning Arthur Meeker, president of Armour & Co. A sample memorandum relative to a "showing on hogs" follows:[3]

MEETING HELD WITH SANFORD (ARMOUR) AT HIS OFFICE, JANUARY 29, 1913, 3:15 P. M.

* * * * * * *

He (Armour) gave me the following figures on which he commented the showings on hogs: I explained to him that nothing had been taken into consideration for "O" (Oklahoma City) and that this should have been. This seemed to relieve his mind. I explained to him what I proposed, personally, doing without going into any detail, nor did he show any interest to raise any inquiries as to any of the detail.

I asked his opinion as to the future prospects and whether I was warranted in assuming these obligations and he spoke rather discouragingly and said that he, himself, surely would not take on anything more. However, that he would be glad to see me do this as he knew he could get along.

Another "Black Book" memorandum, describing a meeting attended by Sulzberger and Armour on January 29, 1913, is illuminating. It follows:

"Sanford" (Armour) seemed very discouraged with the general situation and prospects. I explained this was due, a good deal, to his own foolish tactics in New York; that the situation there had been completely demoralized by his actions and that this was a very sensitive situation. He admitted that he thought they had made a mistake there, but that the rest of the situation did not make him anxious to change his attitude. I explained to him that he was injuring us more than anyone else there as we had larger proportionate interests. He claimed that this was not so, that "H" (Swift) had larger interests but I explained to him that proportionately this was not the case. He said he had no intent to work against us and said that he would arrange now to do the following: Reduce New York 10 per cent this week, 10 per cent next week.

Again in 1914 Armour, Swift, Morris, and Sulzberger interests compared notes at a meeting as follows:[4]

"Sanford" (Armour) says showed plus 10 last week, but worse this week. (NOTE.—This refers to the margin of profit on dressed beef sales.)

Question of eastern killing of sheep and lambs whether or not this is to be included, was discussed but not decided. Klee (Morris) claimed export cattle 1910 should be included, Sanford opposed. I stated that this was more than the mere purchasing of stock.

Export figures for 1910, according to Sanford, showed the following:

Armour, 2,700; Morris 43,000, excluding 17,000 exported from Canada; Swift, 17,000; S. & S., 13,000.

Klee figures, including exports, 18.10. Sanford claimed this figure should be, excluding exports, 17.59. Sanford shows 11.79, including exports, as against 11.73, excluding exports for Sand. (S. and S.) Klee claimed account beef formerly exported by others having included [sic] therefore cattle exported 1910 should also be included. Sanford claimed this incorrect.

In answer to these allegations drawn from Sulzberger's "Black Book," Swift & Co. offers the following defense:[5]

Evidence that Mr. G. F. Sulzberger had interviews with the other packers along about 1913–14 is introduced to convey the idea that there still was some control of meat shipments at that time. There was no control, or "pool," or agreed division of meat shipments. If there had been any cooperative arrangement for mutual protection, instead of keen competition, possibly Mr. Sulzberger would not have been so dissatisfied with the supineness his company was doing as to have sold out shortly afterwards to New York bankers.

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[3] Federal Trade Commission, op. cit., Summary and Pt. I, p. 36.
[4] Ibid., p. 59.
[5] Swift & Co., op. cit., p. 17.

2. INTERNATIONAL MEAT POOL

Sulzberger's "Black Book" also contains some of the details of the International Meat Pool formed by Armour, Swift, Morris, and Sulzberger, with combinations of British and South American concerns to regulate and divide beef and mutton importations from Argentina and Uruguay in South America into the United States and from South America to European ports. It was charged by the Federal Trade Commission that this agreement originated in 1911 and was revived in June, 1914, on the eve of the outbreak of the World War. The principal meetings were held in London with supplemental sessions in Chicago.

The packers admitted that there is a basis of truth to the charge of agreement to regulate shipments from South America to England, but denied that the arrangement included exportation to America. They argued further that the system was justifiable on the grounds that it helped to make more regular the receipts of perishable meats in England, and that it was also in accordance with the Webb bill, which was designed to encourage cooperation in exportation by competing firms in the United States. They also claimed that their representatives in London were under instructions not to enter into agreements with other packers involving division of shipments to the United States.[6]

By way of rebuttal of the packers' argument, the Federal Trade Commission inserted in the record a statement alleged to have been made in 1917 by the president of a committee appointed by the Chamber of Deputies of Argentina to investigate the cost of food necessities. The statement follows:[7]

> They (the combination of packing companies) suppress real competition, maintaining it only in appearance, and they determine by common agreement the prices which are to be paid to producers, reserving to themselves the right to sell at the highest price possible in order to obtain enormous profits which do not remain in the country. Thus it is that these freezing companies have been able to show in their latest balance sheets more than 100 per cent of profits, that is to say that in a single year they have made more than their capital. * * * Here the freezing companies contract with the foreign purchaser, who is to-day, owing to circumstances of the war, a single party, since the Allied Governments have concentrated their purchases in a central office, and having made their agreements at prices which they raise as high as possible, they purchase the livestock from the producers imposing upon them the law of the strongest.

3. COLLUSION IN DOMESTIC TRANSACTION

(*a*) *Meat.*—In addition to the alleged livestock pool and the international meat pool, the packers during the period of 1912–1920 are charged with practicing collusion in the domestic sale of meat in the United States through a mutual exchange on "test costs margins," sales, and prices. For instance, a local manager of Cudahy Packing Co. wrote to the president of Western Meat Co., a Swift concern, as follows:[8]

> Our idea would be that 6¼ cents for average run of gross cattle would be a fair market price figure, provided there are sufficient supplies to meet the summer requirements.

The general plan adopted, as charged by the Federal Trade Commission, was limitation of the amount of dressed meat each packer

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[6] Swift & Co., op. cit., p. 16.
[7] Federal Trade Commission, op. cit., Summary and Pt. I, p. 62.
[8] Virtue, op. cit., p. 662.

would have for sale in proportion approximately to the percentage of live animals purchased under the purchase agreement. Two methods were followed in sale of meats: (1) Make an agreement with small packer with reference to the prices to be charged for meat, (2) packers act together to drive him out of business by reducing the prices of meats at the markets in which he sells.

Many alleged price agreements on dressed and cured meats among the big packers and the independent and subsidiaries are revealed in the report of the commission. At Tacoma, Wash., for instance, the Union Meat Co., jointly owned by Swift, Armour, and Morris, had selling agreements with Carstens Packing Co. and Barton & Co. Representatives of the companies got together from time to time and agreed on prices to retail markets of Tacoma. Prices were fixed on fresh beef, fresh mutton, fresh pork, sausage, etc. Frequently prices were agreed upon through telephone exchanges. At Madison, Wis., the Big Five took turns in cutting prices in order to drive the Farmers' Cooperative Packing Co. out of business. This was brought out in testimony, before the commission, of Charles H. May, manager of the latter organization.[9]

(*b*) *Lard substitutes.*—Likewise collusion, as alleged, was revealed in the files of the packers in the sale of lard substitutes and in the purchase of butter and cream from the farmers and in the purchase of fats from retail butchers. In connection with the sale of lard compounds the following letter from Armour & Co. to their Pittsburgh superintendent, dated January 24, 1918, was inserted in the record of the commission:[10]

> It has always been our understanding that if our organization had the same price as the other fellow that is all they need. This is certainly a fact on substitutes since January 14 and we will be very much surprised if your territory does not triple its business each month. We do not recall having an opportunity in the history of the firm, and if this practice is maintained, it's a pretty safe bet we will get our share.

This was followed on June 28, 1918, by a circular from the superintendent to all of the Armour managers as follows:[11]

> Please give this compound all attention possible. Everybody's price must be the same as yours.

(*c*) *Cheese.*—The effect of the alleged cheese market control is indicated by a letter dated November 4, 1917, from C. E. Blodgett, joint owner with Armour of the C. E. Blodgett Cheese, Butter & Egg Co., to a representative of Neenah & Co., another Armour concern:[12]

> You and I both know that there are enough twins (a form of American cheese), in storage in the United States, if England doesn't come back and buy us, to last for the next two years to come.

The Federal Trade Commission held that this letter was positive proof of a vast hoarding of cheese during the war by the combinations controlling the market. It was pointed out further that while the big packers owned only a few cheese factories, they either owned or controlled the principal large cheese firms which purchased the products from the factories. In Wisconsin, for instance, one of the

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[9] Federal Trade Commission op. cit., Pt. II, pp. 115–116.
[10] Ibid., Summary and Pt. I, pp. 63–64.
[11] Ibid., Summary and Pt. I, p. 64.
[12] Ibid., Summary and Pt. I, p. 62.

chief dairy States, and the most important cheese-producing State, six of the largest cheese concerns were owned or controlled by one or the other of the Big Five packers. Estimates with cheese dealers in Wisconsin show that the Big Five owned or controlled from 75 to 80 per cent of the cheese produced in the State, and in this connection it is significant that Wisconsin in 1914 produced 55.6 per cent of the total for the country.[13] The so-called Plymouth Cheese Board controlled about 90 per cent of the sales. The commission alleged that the packers divided among themselves the cheese factories from which they bought and agreed not to pay premiums above the price set by the Plymouth Board.

The packers' reply to the charge of cheese control, as set forth by Swift & Co., was denial of collusion. Swift, it was claimed, purchased over 90 per cent of its Wisconsin cheese from wholesale dealers in whom it had no financial interest, and the remainder direct from cheese factories. Denial was made also that the company had ever tried to effect the quotations on the cheese board of the State, nor had it been in conspiracy with other packers or dealers to do so.[14]

(*d*) *Eggs and poultry, butter, oleo.*—Similarly the commission charged on the basis of the survey that the Big Five Packers, chiefly Swift and Armour, by 1917 controlled over 65 per cent of the dressed poultry and eggs trade, and in addition were large shippers of butter. Swift handled 50,000,000 pounds in 1916 and Swift and Armour controlled 60 per cent of the oleomargarine business.[15] Two methods of ownership in poultry and egg lines were in vogue, i. e. (1) packers own or control poultry and egg packing plants buying stations (at which packing stock butter as well as poultry and eggs is generally bought) through which they purchase the products from the farmers or country merchants, and (2) they buy from outside poultry, eggs, and butter dealers such as original packers and wholesale distributors. Swift and Armour, it was shown, secured most of their products through plants they owned or controlled. The packing interests owned or controlled 89 poultry and egg plants and 222 buying stations in the chief producing areas of the country.[16]

Swift & Co., replying to this allegation of collusion, stated that they had developed a large volume of these products because their system represented a more economical and efficient method of marketing than was afforded by other marketing agencies, and that the system also avoided rehandling and reshipping, with resulting uniformity of quality and less waste.[17]

4. UNRELATED PRODUCTS

Similarly, it was charged that the big packers were either producers or distributors of a long list of meat substitutes and commodities wholly unrelated to meat. For instance, in addition to butter, lard substitutes, cheese, eggs, they distributed through their branch houses vegetables, canned and cured fish, canned fruits, condiments, and relishes, such as olives, pickles, catsup, chowchow and mustard, peanut butter, coffee, soda-fountain supplies, nuts, and cereals, includ-

[13] Federal Trade Commission, op. cit., Pt. II, pp. 134–135.
[14] Swift & Co., op. cit., pp. 13–15.
[15] U. S. Senate hearings Committee on Agriculture and Forestry, op. cit., Pt. I, 1919, p. 102.
[16] Federal Trade Commission, op. cit., Summary and Pt. I, pp. 231–233.
[17] Swift & Co., op. cit., pp. 11–12.

ing the well-known American breakfast dishes, corn flakes and rolled oats, as well as large quantities of rice.

(*a*) *Rice.*—In one year Armour & Co. sold approximately 16,000,000 pounds of rice, for which over $1,163,306 was received, and this did not include direct sales by car route. In connection with the rice sales the commission broadly hints that Armour & Co. during the World War in 1917 bought up enormous quantities of rice from a Louisiana firm when prices were low and held it for the subsequent rising price scale at a time when the American people were being urged by Mr. Hoover and his Food Administration to find in rice a substitute for wheat and meat on the grounds of national necessity as an aid to the winning of the war.

In rebuttal Armour claimed that the rice distribution on a large scale was in part to meet a public necessity. The wholesale grocers charge that during this period they were frequently unable to find rice except in the hands of the meat packers, who sometimes refused to sell. If the conclusions of the commission are to be accepted, it would appear that one and possibly two members of the Big Five had a virtual "corner" on rice while the United States was at war.[18]

Three letters published by the commission give the views of merchants in three different sections of the country, on the alleged rice "corner" by the packers. The letters follow:[19]

A Boston wholesale grocer said September 6, 1918:

"Armour & Co. went into the rice business on a speculative basis, and not long ago, when there came such a shortage of rice that all dealers were out, Armour's men came to wholesale dealers offering plenty of rice in Armour packages, rice which should have been allowed to come along natural channels and prevented the shortage and higher prices."

A Texas wholesale grocery firm under date of August 26, 1918, wrote:

"As an example of the business tactics of the meat packers we would refer you to the heavy purchase of rice made during the Spring of 1917 by Armour & Co. just at the time when Mr. Armour was posing as a great philanthropist and public-spirited citizen. This firm quietly bought all the available rice in this section, retiring same from the market, and some few weeks later they offered same for sale at an advance of $2 to $3 per sack over the purchase price."

A Philadelphia broker and commission merchant on August 27, 1918, said:

"Last month the wholesalers here had no rice at all, but Swift & Co. had control of the supply and refused to sell to wholesale grocers; they using the rice as a leverage to help them sell other products."

(*b*) *Canned vegetables.*—All of the big meat packers were found to be distributors of canned vegetables and Armour & Co. a large dealer in dried beans. Libbey, McNeil & Libbey (a Swift subsidiary) increased its sales of vegetables from nothing in 1915 to 32,864,695 pounds in 1918. This company controlled 33 per cent of the asparagus output in 1917. The development of the packers canned and preserved fruit business was rapid, as indicated by the increase of Armour's sales from $507,294 in 1916 to $5,845,000 in 1918, a growth of 1,152 per cent.

(*c*) *Canned fish.*—Four of the five big meat packers were important distributors of canned fish, especially salmon. The Swift subsidiary, Libbey, McNeil & Libbey, in the 3-year period, 1915–1918, increased its sales 183 per cent.

(*d*) *Condiments.*—The growth and range of the packers activities in the manufacture of condiments and relishes was noticeable. The

[18] Federal Trade Commission, op. cit., Pt. IV., pp. 217–220.
[19] Ibid., pp. 220.

total sales of peanut butter by the Armour Co. in 1918 amounted to 2,539,181 pounds, for which $575,000 was received, as compared with only 682,552 pounds in 1916.

(e) *Coffee and other commodities.*—Both Wilson and Armour were found to be heavy distributors of coffee which is one of the American grocers most profitable lines. Morris and Armour were actively engaged in distribution of sirups and molasses. Many other food commodities usually carried by the wholesale grocer and wholly unrelated to the products and by-products of the meat-packing plants were found among the goods of the packers. Among these were honey, cocoa, extracts. In addition the commission listed nearly 200 so-called "soda-fountain supplies" sold by Armour & Co. alone. Sales of these supplies amounted to $3,595,000 in 1918 as compared with $1,103,024 in 1916.[20] It might be noted that this million and a half dollar increase took place in the World War years at a time when Mr. Hoover was rationing out sugar in small doles to the American public. One of the packers alone, Armour & Co., advertised a selling line of 3,000 different products in 1917. The World War years witnessed a tremendous expansion of the packer's business.

5. THE CREATION OF JOINT FUND BY THE PACKERS

The commission charged the creation of a fund by the packers to be used in employing lobbyists, to influence legislative bodies, to elect favorable candidates, to control tax officials, to secure modifications of Government rules and regulations, and to bias public opinion by control of editorial policy of the newspapers through advertising, loans, and subsidies. Henry Veeder, the custodian, often made single assessments as high as $50,000, it was alleged. There were two separate pools, "The packers pool," limited in membership to the Big Five, and "The oleo pool" with a varying membership except Armour and Swift who were permanent members. The latter pool provided for division of assessments on the basis of proportionate production of oleomargarine during the preceding year.[21] For instance in November 1915, a resolution was adopted by the "oleo poolers" calling for an assessment of $50,000 to fight the Haugen bill which was aimed to shut out oleomargarine. The first installment of $10,000 was divided among the packers as follows:[22]

Oleomargarine

A (22.6 per cent)	$2, 260. 00
F (15.187 per cent)	1, 518. 70
M (20.409 per cent)	2, 040. 90
H (8.319 per cent)	831. 90
S (33.485 per cent)	3, 348. 50

HENRY VEEDER.

Additional testimony before the Senate Committee revealed a campaign contribution from Veeder on behalf of the packers for Congressman Taggart, who was a member of the Agricultural Committee which considered the "oleo" legislation. Taggart, according to testimony of Francis J. Heney, attorney for the commission, sub-

[20] Federal Trade Commission op. cit., Pt. IV, pp. 230–265.
[21] Federal Trade Commission, op. cit., Summary and Pt. I, pp. 64–66.
[22] U. S. Senate Hearings Committee on Agriculture and Forestry, op. cit., No. 2, p. 1585.

sequently joined the staff of the Federal Trade Commission "to investigate the packers."[23] Congressional committees, considering the legislation held to be adverse to the packers in 1916–17, were flooded with telegrams, according to admissions by Veeder.

Swift & Co., chief apologist for the packers, admitted that the five packers had maintained a joint fund known as the "oleo pool," but argued that these "expenses" were to afford adequate protection against unfair attacks made against the oleomargarine business and the use of the product. According to Swift's statement:

> It is a very common occurrence for competing manufacturers in various trades to adopt associative action for protective purposes; we see nothing reprehensible in this arrangement, especially as it has nothing to do with prices or division of business.[24]

6. WIRING ON

The practice of wiring on, charged against the packers during this period, may be described as follows: In case a shipper is not satisfied with what he is offered in one market, he sometimes forwards his stock to another, but the private wires of the packers are used to head him off so that when he establishes contact with the second station, the prices have already been fixed to correspond with the prices at the first station. As a result the shipper may actually lose the freight and the shrinkage in the weight of his stock. This system enabled the big packers more easily to control prices since shipments to several markets became more and more infrequent under the system of wiring on. Wiring on can be effectively exercised only by concerted action. Following is a typical wiring-on telegram:[25]

ST. JOE, *October 25, 1915.*

To LEAVITT,
Swift's head cattle buyer, Chicago:

D. S. & V. forwarded to-day noon via Burlington five cars heavy natives, dehorned, mostly white faces with few black cattle on them. Bid 890 for Monday held at 915. Billed M. F. Clay to same Laclede, Mo. Think these cattle will go to either Chicago or St. Louis.

VANCE,
Swift's cattle buyer, St. Joseph.

7. MAKING THE DAILY MARKET

Making the daily market is a system whereby the representatives of the big packers go into the principal buying centers at the same hour. The Federal investigators of stockyards practices charged that often these representatives would enter the yards at an hour long after the opening, resulting in violent price fluctuation. The market was usually "made" by the big packers.[26]

8. THE RENDERING MONOPOLY

Another charge of the Federal Trade Commission is that the large packers secured an absolute monopoly of the dead animal at the large stockyard centers and in collection of waste material from the city markets. At the St. Paul yards, for instance, in order to get permis-

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[23] U. S. Senate Hearings, Committee on Agriculture and Forestry, op. cit., No. 2, p. 1604.
[24] Swift & Co., op. cit., p. 21.
[25] Federal Trade Commission, op. cit., Pt. II, p. 90.
[26] Ibid., Pt. II, pp. 93–94.

sion to sell stock in the yards and occupy an office in exchange, the commission houses were required to sign an agreement that all animals that may arrive dead or that may die in the stockyards of the said first party, and consigned to or in charge of the said second party, shall be sold and disposed of as directed by the said first party as to manner, price, and purchaser.[27] The purchaser designated is usually a rendering company controlled by the packer interest that control the stockyards.[28] Thus at Chicago the Globe Rendering Co., which is almost entirely owned by Morris, Swift, Armour, and Wilson interests, for many years has held exclusive contracts for the dead animal at the Chicago Union Stockyards. At Omaha all dead animals at the stockyards go to the Union Rendering & Refining Co., controlled by Swift, Morris, Cudahy interests. Profits accruing from this business range from 40 to 120 per cent on the investment.[2]

9. SPLIT-SHIPMENTS PURCHASES AND PART PURCHASES

The packers were also charged with "split-shipments" purchase by which they are said to keep such a close check on shipments that they are able to detect such shipments by the other factors and cause split lots to sell at the same price on different markets regardless of how many packers are making purchases. "Part purchases" is the system under which two or more packers join in purchasing livestock of one shipper or producer, each taking a part of the shipment at the same time, thus effectively eliminating competition.[30]

10. STOCKYARD OWNERSHIP

The livestock men were pioneers in the agitation against the meat packers. The situation arising at the stockyards in the early days may be said to be one of the focal points of the controversy. In the early days prior to the Civil War the cattle were held in droves on the prairies in the vicinity of the small towns where prospective purchasers went to buy. These pens were the forerunners of the centralized stockyard which came into existence in Chicago in 1865.

Gradually the big packers extended their activities to include the stockyards. The investigation of the Federal Trade Commission revealed 50 stockyards in the United States, of which 12 handled 69 per cent of the business. In fact, the four largest yards received more than 53 per cent of the cattle, 43 per cent of the hogs, and 51 per cent of the sheep. The Big Five packers, it was shown, either jointly or separately had an interest in 28 of the 50 yards, controlled the majority of the voting stock in 22 of these yards, and were jointly interested in 15 of them. Approximately 84 per cent of the animals passed through the yards controlled by the big packers. The markets dominating the meat business and which largely determined the price of cattle, hogs, and sheep for the entire country were Chicago, Kansas City, St. Louis, and Omaha. Chicago and Kansas City were the most important, and these markets were and are the great packing centers in the United States. The prices established here influence the other markets.[31]

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[27] Federal Trade Commission, op. cit., Pt. III, p. 69.
[28] Virtue, op. cit., p. 649.
[29] Federal Trade Commission, op. cit., Pt. II, pp. 156–158.
[30] Ibid., Pt. II, pp. 78–84.
[31] Federal Trade Commission, op. cit., Pt. III, pp. 12–17.

The Federal Trade Commission's conclusions were that (1) packers controlled principal yards because they were profitable and not because the goods were inadequate; (2) controlled in order to keep independents away or to compel them to locate in unfavorable places. Discrimination was shown at Sioux City; (3) packers excluded from all convenient places about the premises all banks and cattle loan companies except those controlled by the packers. This, it was pointed out, gave the packer power to control the livestock credit at the yards. Livestock men argued that it gave the packers power to force stock on the markets in their own interests by calling outstanding loans. (4) Packers established undue control over commission firms through whom livestock is sold. The latter became the tenants of the yards company, thus creating an unhealthy dependency, as alleged.[32]

The alibi as proposed by Swift & Co. was the flat statement that—

> packer ownership of stockyards gives no control over prices of livestock and no control over the commission men in the yards. Swift & Co. is proud of what it has done to help the livestock industry as well as itself by developing the commission stockyards.[33]

11. SUMMARY

According to the finding of the Federal Trade Commission the Big Five packers had come to dominate the meat industry not primarily because of exceptional efficiency as claimed by them, but because of monopolistic control of the machinery of distribution. They controlled the stockyards, the terminal railways, exchange buildings, cattle-loan banks, and market papers, and they held a majority interest in 22 of the 50 livestock yards and a minority interest in 6 additional yards. The packers through their ownership of 92 per cent of the refrigerator cars operated upon the railroads of the country as compared with only 7 per cent of the independents, controlled the distribution of meat products in the United States. This control was strengthened by the "peddler" cars and branch houses, which are regarded as the bulwarks of the meat monopoly.

Direct and indirect ownership of 45 per cent of all the cold-storage space in the United States was pointed out as another important factor in the combination. Finally the big packers, the commission charged, not content with the exploitation of their original field of meat packing with the natural by-product lines and with the integrated control of allied and subsidiary services of the industry, reached out into the production and distribution of practically all commodities which enter into competition with meat products or with other products arising from the animal. The five big packers had gone into the regular wholesale grocery, provision, and produce trade.

It was this sale of so-called unrelated commodities by the packers that played a large part in precipitating the action which resulted in the packers' consent decree in 1920. It is the proposed sale of these same products to-day that has brought on the present fight for and against modification of this decree.

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[32] Federal Trade Commission, op. cit., Pt. III, pp. 73–80, cf. Virtue, op. cit., pp. 639–648.
[33] Swift, op. cit., p. 13.

V. THE PACKERS' CONSENT DECREE

A. EVENTS PRECEDING THE DECREE

1. FEDERAL TRADE COMMISSION INVESTIGATION

On February 7, 1917, two months prior to the entrance of the United States into the World War, President Wilson directed the Federal Trade Commission to investigate and report the facts relating to the production, ownership, manufacture, storage, and distribution of foodstuffs and their by-products; and to determine whether there were "manipulations, control trusts, combinations, conspiracies, or restraints of trade out of harmony with the law or the public interest." The Federal Trade Commission, it should be noted, had been created by the Wilson administration in 1914 and was subject to the call of the President or of either House of Congress for investigations of a broad character including alleged violations of the anti-trust acts.

The call of the President followed closely attempts to secure legislation in the Congress designed to bring about an investigation of the meat industry. Resolutions of this character had been offered by Congressmen Borland and Doolittle as early as February, 1916, following important meetings of the livestock interests in November, 1915, and in January, 1916. The Borland resolution which appeared to have some chance of passage was given a death blow, according to proponents of the resolution on January 8, 1917, by an amendment to the agricultural bill which provided an appropriation of $50,000 to enable the Department of Agriculture to investigate the marketing of livestock. The charge was made that the amendment was drawn to obstruct a real investigation of the packers who, it was alleged, did not fear the Agricultural Department. Blocked in their efforts to obtain what they regarded as necessary legislation certain Congressmen representing the livestock interests on the same day of the passage of the amendment called upon President Wilson and urged an investigation by the Federal Trade Commission.

On February 28, 1917, Congress appropriated $250,000 for the foodstuffs investigation and in order to expedite the work the inquiry was divided into several parts, namely grain, flour milling, canned foods, and meats. The Department of Agriculture was called upon to aid in the meat inquiry, concerning itself primarily with a study of the production of livestock and its marketing up to the stockyard; while the Federal Trade Commission was to investigate the slaughter of animals, wholesale distribution of meats, and in general the activities of the meat-packing companies.

The commission began its work on July 1, 1917, and rendered its general conclusions to the President on July 3, 1918. Subsequently during the latter part of 1918 and 1919 six special reports were published as follows:

I. Growth and Position of Meat Packing Industry.
II. Evidence of Combination Among Packers.
III. Methods of the Big Five in Controlling Meat Packing Industry.
IV. Five large Packers in Produce and Grocery Foods.
V. Profits of the Packers.
VI. Study of Cost of Fattening, Growing and Marketing Beef Animals (prepared by the Department of Agriculture).

The commission informed the President in answer to his question as to whether or not there exist "monopolies, control trusts, combination or restraint of trade out of harmony with the law and the public interest," that they "found conclusive evidence that warrants our unqualified affirmative," and then proceeded to make a series of recommendations to remedy the situation, the gist of which was that the Government Railroad Administration should acquire (1) all rolling stock used for the transportation of meat animals; (2) principal and necessary stockyards of the country; (3) all privately owned refrigerator cars, with the declaration of a Government monopoly; (4) the Government to take over necessary branch houses, cold-storage plants, and warehouses as to insure competitive marketing and storage in principal centers of distribution. In conclusion the commission complained right bitterly of the alleged tactics of the packers, who, they said, placed "every obstacle that ingenuity and money could devise to impede them."[1]

The principal findings of the commission as to the alleged monopoly and the practices and methods followed by the Big Five packers have been enumerated heretofore in Part III. We are concerned now primarily with the effect of the report upon the public and its Representatives in Congress, the packers and their opponents, as well as subsequent developments.

2. ATTEMPTS AT LEGISLATION

Within a few weeks after the completion of the investigation by the commission and the submission of general conclusions to the President, bills were introduced in both Houses of Congress to authorize the President to acquire and operate all the larger stockyards which had been recommended by the commission. There were indications of a growing disposition in the Congress and in administration circles to take some action with respect to the large meat packers. Mr. Hoover, then Federal Food Administrator, in a letter to the President dated September 11, 1918, declared that "I scarcely need to repeat the views that I expressed to you nearly a year ago, that there is here a growing and dangerous domination of the handling of the Nation's food stuffs." Mr. Hoover stated further that he did not feel that the Government should undertake the solution of the problem by the temporary war-power authority, but that "the problem should be placed before Congress for searching consideration, exhaustive debate, and the development of public opinion."[2] Meanwhile the packer legislation was pending in congressional committees. There was a division of opinion as to what sort of remedy should be applied to the packer problem. The Sims and Kendricks bills provided in general for the acquirement and operation by the Government of all the larger stockyards, while the Kenyon bill was strictly a war measure designed to treat the packing industry and its business as public utilities. There was much debate and little action.

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[1] Federal Trade Commission, op. cit., Summary and Pt. I, pp. 23–27.
[2] Cong. Rec., copy of letter from Herbert Hoover to President Wilson, 71st Cong., 2d sess., Jan. 17, 1930, pp. 1772–1773.

3. THREATS OF COURT ACTION

While the Congress debated, during the second Wilson administration, on March 5, 1919, Mr. A. Mitchell Palmer became Attorney General. According to Mr. Palmer's testimony before the House Committee on Agriculture, the question of what should be done with the meat packers was the first problem to engage his attention as Attorney General. Some 8 or 10 separate and special investigations had been conducted by both Senate and House committees besides the intensive inquiry of the Federal Trade Commission by the President's direction. Mr. Palmer engaged a special assistant to study the subject and make a report to him. As a result of this study in September, 1919, the United States district attorney at Chicago was called upon to cooperate with the Justice Department in conducting an investigation of the packers before the grand jury.[3] Late in October similar steps were taken before a New York grand jury. There was no definite program of indictment or criminal procedure in these moves according to the Attorney General.

B. THE PACKERS' CONSENT DECREE

It was at this juncture that the Attorney General received information from various sources that the representatives of the five great packers would like to meet with him and discuss the problem. Word came to Mr. Palmer that the packers claimed that they had never been heard adequately by the Federal Trade Commission and that they desired to present their side of the controversy before the Department of Justice took any action against them.

Conferences between packers' representatives and the Attorney General followed with the result that Mr. Palmer and his associates drew up a stipulation which became the basis of the consent decree subsequently entered in the court. It is of interest to note here that the Attorney General, according to his testimony before the House Committee, informed the agent for the packers in the preliminary negotiations that the only basis on which he would discuss their affairs would be that they (the packers) must go out and stay out directly and indirectly, from all the lines of business unrelated to the meat business, and in addition must submit to an enforceable injunction against any act that would constitute a violation of the Sherman antitrust law. This was agreed to by the packers, and then the question of the scope of the so-called unrelated lines were taken up, the whole discussion covering a study of several months.[4]

1. THE TERMS

The consent decree as finally drawn and agreed upon, according to an analysis by Attorney General Palmer, provided for the following:[5]

(1) Perpetual injunction entered against 86 corporation defendants, 5 additional companies and their fifty and odd subsidiaries and their affiliated concerns and fifty and odd individuals, the large and influential stockholders restraining them from doing any act amounting to a combination in restraint of trade as tending to monopoly.

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[3] U. S. House hearings Committee on Agriculture, op. cit., 1920, Pt. 3, pp. 2309–2357.
[4] Ibid., Pt. 3, p. 2313.
[5] Ibid., Pt. 3, pp. 2314–2317.

(2) Restrains and perpetually enjoins them forever from engaging in any unlawful trade practice.

(3) Takes defendants out and forever keeps them out, directly and indirectly, of the public storage-warehouse business, both as corporation defendants and as individual defendants.

(4) Takes them out and forever keeps them out, directly and indirectly, of the public stockyard business.

(5) Takes them out and forever keeps them out, directly and indirectly, from every line of retail business whatever, both in meat line and in every other line.

(6) Takes them out and forever keeps them out, both directly and indirectly, of all the so-called unrelated lines and particularly of all the lines of wholesale groceries, which have been the cause of the most widespread complaint in the country. It provides that the corporation defendants shall immediately go out of the business and that individual defendants shall not jointly or collectively ever be interested to the extent of control in any corporation or firm or partnership which engages in any of these businesses.

"The decree takes these defendants from all these related lines and brings them back, with a sharp turn, to the point where they began—it makes butchers of these five great packers and nothing else," Mr. Palmer declared, in concluding his analysis of the decree before the House committee.[6]

That was the Attorney General's interpretation of the consent decree in 1920.

In reply to an inquiry from a member of the House committee with reference to the disposition of the refrigerator cars which had constituted one of the principal causes of complaint, the Attorney General declared that they "took the poison out of this refrigerator car complaint" by inserting a clause in the decree restraining the packers from using any part of their distribution system for the transportation of unrelated products.[7]

Thus the packers were allowed to retain their great private system of distribution which, as has been pointed out heretofore, in the opinion of the packers themselves has formed the basis of the tremendous expansion of the meat industry. Likewise the packers were left undisturbed in their sale of butter, cheese, eggs, poultry, cottonseed oil, and oleomargarine.

The Attorney General's comment on the proposition that direct sale of packers' products to the consumer might result in cheaper prices to the latter is of interest in the light of present-day theories (1930). Mr. Palmer declared that such a system would work as all other systems of that kind worked. "They (the packers) had the ability to undersell their competitors and they would undersell them long enough to drive them out of the market. The consumer would profit temporarily, but ultimately and finally would pay the price."

The Department of Justice favored keeping the packers out of the retailing business, he declared, in reply to a direct question as to the department's attitude.[8]

On February 27, 1920, the Attorney General filed a petition in the Supreme Court of the District of Columbia, alleging an unlawful combination and asking for relief. By prearrangement the case was not contested and a consent decree agreed to before the petition was filed, was entered on the same day the petition was filed. The five packer defendants, Armour & Co., Swift & Co., Wilson & Co. (Inc.), Morris & Co., and the Cudahy Packing Co. and subsidiary and

[6] U. S. House hearings, Committee on Agriculture, op. cit., pt. 3, pp. 2314–2315.
[7] Ibid., pt. 3, p. 2316.
[8] Ibid., pt. 3, p. 2318.

affiliated corporations and individuals were given up to the maximum limit of two years to carry out all of the terms of the decree. The packer defendants consented to the entry of the decree only upon a condition expressly embodied in the decree as follows:[9]

> That their consents to the entry of said decree shall not constitute or be considered as an admission, and the rendition or entry of said decree, or the decree itself, shall not constitute or be considered an adjudication that the defendants, or any of them, have in fact violated any law of the United States.

2. THE EFFECT OF THE DECREE

The effect of the decree was the same as though Congress had legislated on the subject. With the exception of the stockyard act of 1921 which provided for the supervision and regulation of rates and practices of the yards of the Government, the decree apparently served to forestall certain legislation prompted by the Federal Trade Commission revelations. Senator Norris, member of the Senate Committee on Agriculture and Forestry, on January 17, 1930, declared in the Senate that the effect of the decree was to "put into law, through the instrumentality of that decree, some of the things that were pending before the Committee on Agriculture of the Senate, and I charged then and I do not remember that anybody disputed it, that the object was to prevent Congress by means of this decree, from legislating upon the subject matter contained in the decree, and it had that effect."[10]

Senator Norris declared further that immediately the decree was entered the contention was successfully made by the packers that is was useless and unnecessary for Congress to legislate, "But when Congress adjourned about the first thing that happened was that the packers attacked their own decree."[11]

VI. COMPLIANCE WITH TERMS OF DECREE AND EFFORTS TO MODIFY

A. COMPLIANCE

The packers' consent decree was entered and became operative on February 27, 1920, with the provision that the packers would have a maximum of two years for full compliance with all the terms specified.

On February 3, 1922, the Senate by resolution (S. Res. 211, 67th Cong., 2d sess.) called upon the Attorney General to report to the Senate (*a*) what steps, if any, have been taken to enforce and carry out the terms of said decree; (*b*) what modifications, if any, have been proposed to him or are being considered by him, with a view to his applying to the court for the adoption therefore; (*c*) any and all evidence which may have been taken in the recent hearings on the subject before the representatives by the Attorney General's office.

Attorney General Daugherty, of the Harding administration, complied with the request on March 1, 1922, transmitting to the Senate a report of some length. Additional reports were submitted in April, 1922, and in March, 1923. In compliance with a second Senate resolution (S. Res. 145, 68th Cong., 1st sess.) and a third

[9] U. S. Senate, letter from the chairman of the Federal Trade Commission packers' consent decree, 68th Cong., 2d sess., No. 219, 1925, p. 3.
[10] Cong. Rec., 71st Cong., 2d sess., Jan. 17, 1930, p. 1774.
[11] Ibid., p. 1774.

(S. Res. 167, 68th Cong., 1st sess.) Mr. Daugherty furnished the Senate with still further information. These reports contain a review of the history and progress of the decree up to March, 1924, including an account of the manner in which the big packers had complied, as well as an account of litigation arising from the decree.

1. PLANS PROPOSED FOR DISPOSAL OF STOCKYARDS

Meanwhile, within 90 days, or on August 31, 1920, in accordance with a stipulation of the decree, the Big Five filed with the Federal Trade Commission a plan by which they proposed to divest themselves of 15 large stockyards by selling to F. H. Prince & Co., a Boston firm. The commission after an investigation made an adverse report on the proposed plan to the Attorney General on the ground that the relation existing between the packers and the Boston concern precluded the satisfactory compliance with the terms of the decree. The plan was thereupon withdrawn by the packers, who subsequently filed two other plans, both of which were also rejected by the courts on similar grounds. Finally Armour and Swift filed a fourth plan for the disposal of the stockyards through the creation of a trust company until holdings were sold by the defendants. Senator Sutherland, later Associate Justice of the United States Supreme Court, and Col. Henry W. Anderson, of Richmond, Va., were appointed as voting trustees of the stock. This proposal was accepted by the court and later somewhat similar plans were approved for Morris & Co. and Wilson & Co., with a Washington trust company as trustees. The Cudahy Packing Co. was allowed to dispose directly of its shareholdings. By the end of 1924 Cudahy and Morris had sold most of their holdings, Wilson had sold little, although they had no control in any stockyard companies, and Armour and Swift had made little progress.[1]

2. UNRELATED COMMODITIES

With reference to so-called "unrelated commodities" the investigation indicated the following:

Four of the packers, Swift, Morris, Wilson, and Cudahy had by December, 1924, almost completely disposed of their share holdings in companies handling unrelated lines and of their stock of goods in those lines. It is significant, however, that Libbey, McNeil & Libbey (a Swift subsidiary) continued as a large producer and distributor of canned goods and grocery lines. Wilson & Co. had apparently disposed of its unrelated line business by selling its canning plants to a reorganized competitor, Austin, Nichols & Co., one of the largest wholesale grocery companies in the United States.[2]

The compliance of Armour & Co. is a narrative of numerous requests for extensions of time. On February 3, 1922, this company procured an extension until August 27, 1922, to dispose of its unrelated lines and to divest itself of any interest in concerns manufacturing, selling, or distributing such lines. On September 7, 1922, a second extension was secured until May 1, 1923; on May 18, 1923, a third extension was requested of the court and granted until November

[1] U. S. Senate, letter from the chairman of the Federal Trade Commission, op. cit., pp 6-8.
[2] Ibid., pp. 10-11.

1, 1923; and subsequently a fourth extension until December 17, 1923, was allowed.[3]

Apparently even the well-known patience of the district court judge was worn threadbare by this time, for a fifth application for extension until February, 1925, was denied by the court on February 21, 1924. Within one month Armour had joined Swift in filing a motion in the Court of Appeals of the District of Columbia in connection with the Canneries case, the avowed intention being to attack the validity of the decree. After the canneries had been permitted to intervene on June 4, 1924, motions were filed by Armour and Swift on November 5, 1924, to vacate the decree. Although the court as indicated above, in February, 1924, had refused to grant further extension of time to Armour to dispose of its unrelated products, that company, it is charged, continued its distribution of these commodities until April 24, 1925, when the decree became inoperative because of the motion of the Canneries Co. Meanwhile, Armour in a report of its affairs claimed that of a total stock of canned and dried fruits on hand on March 3, 1923, amounting to $7,830,105.79 it had disposed of $7,777,169.64. Armour appeared to have more difficulty in the matter of disposing of its large stocks of grape juice and fruit preserved for on the same date, three years after the entry of the decree, it still had on hand $1,616,986.96 of these stocks out of a total of $3,584,102.67 on February 20, 1920, the date of the decree.

The total value of unrelated stocks on hand on the shelves of Armour at the time of the entry of the decree was in excess of $10,250,000. The company reported to Attorney General Daugherty according to his report submitted to the Senate on March 8, 1924, that it had disposed of all but $3,352 worth. However, as stated further by the Attorney General the company had continued to operate five plants in four different States, manufacturing unrelated products "so as to maintain the same as going concerns in order that they might have a better opportunity to sell them, and, of course, procure a better price therefore when sold." (The language is Mr. Daugherty's.) "Armour & Co. have distributed the products of these plants and have on hand such products of the value of about $1,000,000."[4]

The consent decree was entered on February 27, 1920, by its terms full compliance, including disposition of unrelated lines and stocks in companies manufacturing such lines, was to have been made within two years or in the early part of 1922. The Attorney General's report quoted above was dated March 8, 1924.

3. COLD-STORAGE WAREHOUSES, MEAT MARKETS, AND NEWSPAPERS

The public cold-storage warehouse owned by the packers had been disposed of, while there was no indication that the packers owned or operated any retail meat markets. They had also disposed of their holdings in market newspapers. It should be noted that the packers had never been engaged in the retail meat business before the decree.[5]

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[3] Cong. Rec., 71st Cong., 2d sess., Feb. 12, 1930, pp. 3496-3497.
[4] U. S. Senate Report, Letters from the Attorney General the Big Five Meat Packing companies, 68th Cong., 1st sess., No. 61, 1924, pp. 11-12.
[5] U. S. Senate, letter from the chairman of the Federal Trade Commission, op. cit., p. 10.

Although Attorney General Daugherty on March 8, 1924, declared that—

it is thought that the decree has been completely carried out, with the exception of the provision relating to unrelated commodities and to stockyards, and that the provisions relating to unrelated commodities have been carried out in spirit and that we are now only striving to carry out the letter thereof [6]—

We find Attorney General Mitchell on February 5, 1930 (10 years after the entry of the consent decree), making the following declaration to Senator McNary, chairman of the Senate Committee on Agriculture and Forestry:

The provisions of the decree especially with reference to packer ownership of stockyard stocks and handling of unrelated commodities have never been fully complied with.[7]

Mr. Mitchell pointed out that the various extensions of time for complete compliance have been granted to the packers by the court from time to time until May 1, 1925, on which date the decree itself became inoperative by court order pending the determination of the rights of the California Cooperative Canneries Co., which had been permitted to intervene over objection of the Government for purpose of having the decree vacated.

The restoration of the decree on July 24, 1929, as result of two decisions of the United States Supreme Court, the one reversing the Court of Appeals which had permitted the Canneries Co. to intervene, and the other declaring the decree valid and binding in (Swift & Co. *v.* U. S., 276 U. S. 311, March, 1928), found the packers with additional large stocks of unrelated commodities on hand. Further extension of time for the disposal of these goods now became necessary, in order to afford the defendants reasonable opportunity to do so in accordance with the terms of the decree, according to Attorney General Mitchell.[8]

It is significant that in July, 1930, the time for the compliance with the decree by the packers was temporarily extended again by the court pending action on the question of modification which was scheduled to be heard in October, 1930.

In this connection it is interesting to recall Attorney General Palmer's statement on April 2, 1930, before House Committee on Agriculture:

This decree takes these defendants from all of these unrelated lines and brings them back, with a sharp turn, to the point, where they began. I do not want to appear brutal in using the term, but this decree makes butchers of these five great packers and nothing else.[9]

That declaration was made 10 years ago by the man who drew up the decree in conference with the five big packers who had requested a peace conference.

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[6] U. S. Senate report, letter from the Attorney General, op. cit., p. 15.
[7] Congressional Record, letter to Senator McNary from Attorney General Mitchell, 71st Cong., 2d sess., Feb. 12, 1930, p. 3495.
[8] Cong. Rec., 71st Cong. 2d sess., op. cit., p. 2629.
[9] U. S. House hearings, Committee on Agriculture, op. cit., vol. 3, pp. 2314–2315.

B. ATTEMPTS TO MODIFY THE DECREE

1. THE CALIFORNIA CANNERIES COOPERATIVE ASSOCIATION

The consent decree was entered in February, 1920. A little more than 12 months later efforts were being made to modify it. Conversations were held as early as April, 1921, and on August 10, 1921, the Washington Herald published a news story to the effect that Attorney General Daugherty was about to move for modification. Prior to this attorneys for California Cooperative Canneries who claimed to have a 10-year contract to furnish canned fruits to Armour & Co., protested against the alleged cancellation of their contract by Armour, whereupon it was arranged that Armour might take the pack for the season of 1920. Later in September, 1921, the Canneries Co. requested the Government to move for modification so as to permit the meat packers to continue to distribute their products. Other interests, including some canners, manufacturers, and agricultural organizations, joined in the request.[10]

While the Attorney General was considering the request representatives of the Southern and the National Wholesale Grocers Associations moved the court for permission to intervene in any attempt of the packers to secure modification of the decree concerning unrelated lines, and the court without notice to the Attorney General granted the petition. This action precipitated warfare between the Government and the district court, with the result that an interdepartmental committee was appointed by the Attorney General to act as a sort of referee between the wholesale grocers and the canners. This committee now handed down a decision to the effect that even if the Attorney General felt that a modification of the decree was proper that no action could be taken without a court hearing since the wholesale grocers had been allowed to intervene.

The California Canneries now proceeded (April 22, 1922) to file a motion to procure a modification so as to permit the meat packers to distribute unrelated lines, or to raise the question of the validity of the decree. The decree itself was now attacked by a corporation closely allied with Armour, one of the big packers which had voluntarily consented to the decree. The Attorney General and the wholesale grocers opposed the intervention and the court subsequently denied the right of the California company to intervene. On January 10, 1923, petition for rehearing on motion to intervene was filed by the company and upon refusal to grant it an appeal was taken to the Circuit Court of Appeals of the District of Columbia which on June 2, 1924, reversed the decision of the lower court and granted the Canneries the right to intervene. The California company now petitioned the Supreme Court of the District of Columbia to vacate and set aside the consent decree on the ground of (1) lack of jurisdiction of the court to enforce the decree; (2) creation of another monopoly in wholesale grocery business, and (3) that decree itself violated the antitrust laws.[11]

This motion served to suspend the operation of the decree from 1925 until the Supreme Court of the United States in May, 1929, held that the Canneries Co. never should have been permitted to

[10] U. S. Senate Doc. No. 219, op. cit., pp. 13-14.
[11] Ibid., p. 15.

intervene (U. S. *v.* California Canneries Cooperative Association, 279 U. S. 552). The court held that under the expediting act of February 11, 1903, in suits in equity under the antitrust act in which the United States is complainant "appeal must be direct to the court from the final decree of the trial court.[12]

2. ARMOUR AND SWIFT ATTACK VALIDITY OF DECREE

Meanwhile, after the failure of the first attempt of California Canneries to have the decree vacated, Armour and Swift, on November 2, 1924, stepped from behind the scenes and in two motions attacked the validity of the decree to which they had voluntarily consented in February, 1920. The motion to vacate and set aside was made on the following grounds:

(1) The consent decree is void because the Supreme Court of the District of Columbia was without jurisdiction to enter same for the following reasons: [13]

1. No adjudicated facts before the court.
2. Decree beyond jurisdiction and power of court.
3. Decree violated fifth amendment of Constitution.
4. No case before court within meaning of Constitution.

(2) Decree is void because it violated antitrust laws and consent of the Attorney General nor defendants could validate it.

(3) Attorney General without power to consent to decree.

Attorneys for Armour and Swift now performed a legal somersault, arguing in their motions that the Government in its opposition to the petition of the California Cooperative Canneries had implied or asserted that the Big Five packers were guilty of violating the antitrust laws. This, they held, constituted a violation on the part of the Government of the terms of the decree. Thus the innocent looking clause or "conditions" which had been inserted in the decree upon the insistence of the packers in 1920 now became a plague to the Government in its efforts to enforce the decree.

On May 1, 1925, the two motions to vacate the consent decree were overruled, whereupon Swift & Co. and Armour & Co. and their associates took appeals to the Court of Appeals of the District of Columbia. On May 28, 1926, the United States filed in that court a motion to dismiss the appeal for want of jurisdiction on the grounds that the appeal could be made only to the United States Supreme Court. On January 3, 1927, the Court of Appeals of the District of Columbia dismissed the packers' appeals, and Swift and Armour now moved that the appeals be transferred to the United States Supreme Court. Subsequently it was ordered that the entire record of the cause be placed with the United States Supreme Court.

Associate Justice Brandeis delivered the opinion of the Court. The Justice held that (1) the motion to vacate the consent decree could not be sustained upon the ground that there was no case or controversy to afford jurisdiction since (*a*) an injunction may issue to prevent future wrongs though no right has yet been violated; and (*b*) because, if the court erred in deciding that there was a controversy, the error could have been reached only by bill of review or appeal.

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[12] United States *v.* California Cooperative Canneries, 279 U. S. 553.
[13] U. S. Senate Doc. 219, op. cit., pp. 15–16.

(2) A motion to vacate would not lie upon the ground that the facts necessary to constitute a violation conferring jurisdiction under the antitrust act were neither admitted nor proved, since an injunction limited to future acts might be based upon allegations of the bill not specifically denied. Error in that regard would not go to the jurisdiction, and besides being of a kind reviewable only by appeal, was in this case waived by consent to the decree. (3) Prohibitions in an injunction decree, which standing alone are too general, are to be read with other parts of the decree and with allegations of the bill, for the purpose of removing uncertainites. (4) Provisions of the consent decree can not be assailed by a motion to vacate upon the ground that they enjoin future conduct in terms too vague and general. (5) Nor upon the ground that defendants are debarred in the future from lawful lines of business not connected by any finding of facts with the conspiracy charged; since consent to entry of the decree without such findings left power in the court to construe the pleadings and therein to find circumstances of danger justifying such prohibitions. (6) Even if the consent decree contain prohibitions which are contrary to the antitrust act and the common law, and are grossly erroneous, it is not therefore void. (7) If the court, in addition to enjoining the acts that were admittedly interstate, enjoined some that were wholly intrastate and in no way related to the conspiracy to obstruct interstate commerce, it erred; and had the defendants not waived such error by their consent, they might have had it corrected on appeal. But the error if any, does not go to the jurisdiction of the court. (8) The consent of the Attorney General to the decree, whether correctly or erroneously given, was within his official discretion.[14]

The legal procedure resulted in an entire suspension of the consent decree from May 1, 1925, until July 24, 1929, when the decree was again restored upon mandate of the United States Supreme Court. Since there was no statute of limitation to be invoked against the packers in the matter of filing motions, within a few days (August 10, 1929) new motions for modification of the decree were filed in the Supreme Court of the District of Columbia by attorneys representing Armour and Swift. The petitions were superseded by amended petitions filed on April 2, 1930. The court now ordered further extension of time for compliance with the terms of the decree.

History now repeats itself. The Wholesale Grocers Association intervened with motion to dismiss the petition of the packers; a hearing was staged and the motions were overruled on June 28, 1930. In rendering the decision the court said:

> It is not necessary at the present time to decide upon the power of the court to modify the consent decree without the consent of the parties to it. If after a full hearing the Government should become convinced that the decree should in justice to the defendants be modified and should consent to the modification, the refusal of the interveners (the Grocers Association) to consent would not in itself prevent the court from modifying the consent decree if the court should take the same view as the Government upon the facts presented to it.[15]

In the meantime some of the defendants have entirely disposed of their business in unrelated commodities and of their holdings of stockyard stock according to the Government. All defendants, however,

[14] Swift & Co. et al. *v.* United States, 276 U. S. 327.
[15] The United States Daily, Vol. V, No. 101.

have advised the court that while they do not seek modification they are willing to consent to such modification of the decree provided it be made applicable to all.

The Government now challenged the defendant packers for proof as to the material allegations of the petitions for modification and trial was ordered upon the issues raised. The trial was held in the Supreme Court of the District of Columbia during October and November, 1930. The case is now (December 27, 1930) before the court for a decision upon the law and facts.

VII. THE ISSUES BEFORE THE COURT

The issues before the court of the District of Columbia as outlined at the recent trial present many interesting questions involving political as well as economic factors which should be of considerable interest to students of affairs and publicists. Recognizing no Waterloo and burning their bridges behind them, so to speak, after 10 years of legal defeat, the astute attorneys representing the packers have renewed the assault, using up-to-date economic weapons. Specifically the petition for modification of the decree rests upon the following theory:

> On account of conditions now existing and because of certain radical and revolutionary changes, which have occurred since its entry, in economic conditions, merchandising methods, statute law of the United States, and interpretation thereof, the decree is unjust, unfair, inequitable, and oppressive to these defend ants, unnecessary and against the public interest.[1]

To this plea the Government in effect replied, "Prove it." Reiterating a statement rendered to the United States Senate in reply to a Senate resolution [2] in May, 1930, Attorney General Mitchell, at the outset of the recent trial, declared to the court that the "question whether there should be a modification is a judicial question to be decided on the law and the evidence * * * The decree is a judicial decree and is to be dealt with as such."[3] In other words, 10 years after the decree was entered, the Government, guided by new leaders of a different political faith and theory from that of the leaders who promulgated the decree, has moved from a position of positive opposition to any change in the decree to a position which is a sort of "armed neutrality" pose.

The Government, it is quite apparent, has adopted the attitude that there may be something to the arguments of the packers after all. Whereas the Government under a Democratic administration in 1920 took the offensive and practically forced the consent decree down the packers' throats, merely calling in the court to perform the necessary legal rights, in 1930 under Republican leaders, it says in effect "this is a matter for the court to decide upon the law and the evidence." No better example of the changing complexion of our Federal Government as result of new political leaders and political theories could be given than this incident of the consent decree. The litigation presents material for an interesting study in American political science. Many able students of American government make

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[1] Petitioning defendants' statement of the case, U. S. of America, petitioner, *v.* Swift & Co., et al., Supreme Court of the District of Columbia in Equity No. 37623 (1930), p. 13.

[2] U. S. Senate, S. R. 275, 71st Cong., 2d sess. (1930).

[3] Brief for the United States, the U. S. of America, plaintiff, *x.* Swift & Co. et al., defendants, Supreme Court of the District of Columbia. in Equity No. 37623 (1930). (Prefatory note.)

much of the rigidity of the Constitution, of the permanency of the body of our law, of precedents, of conservatism of the Government. That there is truth in these assertions no one will deny; but the picture drawn is not complete. The political institutions of yesterday are not those of to-day notwithstanding a written Constitution and notwithstanding profound and binding decisions of the United States Supreme Court. The testimony given in 1920 before a House committee by Attorney General Palmer, the author of the consent decree, to the effect that the decree is a perpetual injunction, that it restrained and perpetually enjoined the packers from forever engaging in any unlawful trade practices, that it forever keeps them out of every line of retail business and unrelated lines, seems just a bit ludicrous to-day (1930) in the light of the 10-year legal battle and recent developments in connection with the consent decree. The packers certainly accepted no such conditions of perpetuity when they agreed to consent in 1920. They evidently did not take Mr. Palmer's statements at their face value. A benevolent spirit should prompt the detached student not to take Mr. Palmer too literally. Mr. Palmer did not take himself seriously, perhaps.

Political factors based on judicial decrees therefore loom large in the disposition of the consent decree litigation. For instance, there is the Sherman antitrust law adopted in 1890 and subsequently subjected to many and varied interpretations in a series of notable judicial decisions beginning with the Knight case and ending with the Standard Oil, Tobacco, and the Steel cases. Is the fate of this famous trust act to be sealed by the decision of the Supreme Court justice of the District of Columbia? Is the court's decision to be taken as a cue for future political policies upon the important subject of the control of the trusts? The packers who are pleading for license to expand make no denial of the fact that without such license they constitute to-day a business of the greatest magnitude, controlling 70.73 per cent of the total output of packer products which supply the stream of interstate commerce.[4] It is stated in the Sherman law, section 2:

> Every person who shall monopolize or attempt to monopolize or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of misdemeanor.

Do the present proportions of Armour and Swift alone constitute a monopoly within the meaning of section 2? If they are not a monopoly, as would be indicated in the event of agreement to modification, then what are these packers and what set of conditions would constitute a monopoly? In this connection attorneys for the packers pointed with much emphasis to the Steel case (251 U. S. 417) which was decided on March 1, 1920, or three days after the consent decree was entered. This case definitely decided, they said, that size alone is not sufficient to show a violation of the antitrust act in the absence of proof, that in addition to its bigness, a corporation is able to control production and prices, or in other words, to achieve monopoly. The United States Supreme Court, it was pointed out, refused to dissolve the United States Steel Corporation though it controlled

[4] Brief for the United States, op. cit., p. 42.

45 per cent of the entire steel business of the United States.[5] The answer of the Government attorneys was that the Steel case is not analagous to the Packers' case, in that the former concerned the entry of an original decree in an initial proceeding, whereas the consent decree concerns the retention or abandonment of an existing decree entered upon consent by the parties and subsequently sustained by the Supreme Court of the United States. The Steel case, the Government argued, if successful, would have been but a first offense, whereas the Packers' case represented but a 10-year chapter in three decades of repeated litigation against defendants for violation of the same law.

It was asserted further by the Government that the decision in the Steel case was rendered by a vote of 4 to 3, three justices dissenting and two taking no part. "While the decision is none the less the law," the Government stated, "the close decision of the justices warrants hesitancy in expounding the precise limitations of the decision by construction." It was also asserted that the Steel case was successfully met by the subsequent decision in Swift & Co. *v.* United States (276 U. S. 311),[6] in which it was held that the exclusion of petitioners from a business lawful to others was within the proper limits of judicial power, where the pursuit of such business was one of a chain of circumstances which together constituted a threat of monopoly.[7] The Government argued that it was precisely upon this theory that the original suit and the consent decree rested; namely, "that the collective situation of the packers as to their method of doing business including the control of stockyards, use of refrigerator cars, and handling of unrelated commodities, constituted a menace of monopoly because of the tremendous scale on which these concerns did business."[8]

The Government submitted the proposition that as a factor warwanting fear of monopoly the proper comparison of Swift and Armour business should be, not with total business in the respective lines handled, but with total business in interstate commerce. This, it was stated, is based on two reasons:

1. Provision in section 2 of the Sherman Act relating to attempts to monopolize any part of the trade or commerce among the several States.
2. Monopolistic control of interstate commerce enables price domination of local commerce.[9]

However, the battle over interpretations of the antitrust act as to its relation to the consent decree did not end with the discussion of the Steel and Swift cases. The packers' attorneys went back to the famous Standard Oil case (221 U. S. 1) and the tobacco case (221 U. S. 106). In the Standard Oil case, decided on May 29, 1911, as they indicated, the Supreme Court adopted the view that the antitrust act was intended to embrace only contracts or acts which are unreasonably restrictive of comparative conditions, and thus restrain the free flow of commerce and tend to bring about those evils, such as enhancement of prices, which are considered to be against public policy.[10] Both this case and the Tobacco case, according to the

[5] Brief of Swift & Co. and Armour & Co. in support of petitions for modification of packers consent decree in Supreme Court of the District of Columbia, in equity No. 37623 (1930), pp. 17–19.
[6] Brief for the United States, op. cit., pp. 94–97.
[7] Ibid., p. 28.
[8] Ibid., p. 91.
[9] Ibid., pp. 38–39.
[10] Brief of Swift & Co., op. cit., p. 8.

packers' representatives, definitely settled as law, in the case of private trading and manufacturing companies that the restraint of competition in order to amount to restraint of trade must be undue or unreasonable.[11] In the Standard Oil case it is of interest to note that the doctrine of the "rule of reason" was first applied to the Sherman Act by Chief Justice White. It was subsequently vigorously challenged in the partially dissenting opinions of Justice Harlan in both the Oil and Tobacco cases.[12]

The packers asserted that in all cases where consolidation of corporations has been held to violate the Sherman law, the control has been more than 50 per cent, and cited, as examples, American Tobacco Co. with control of 70 to 96 per cent; Standard Oil with over 50 per cent; Cash Register, 80 per cent; Dupont de Nemours & Co. from 64 to 100 per cent; International Harvester, 80 to 85 per cent.[13]

Answering the references to the Oil and Tobacco cases, the Government claimed that the Supreme Court in the Steel case drew distinction between a first offender and an old offender in response to the citation of United States *v.* American Tobacco Co. and United States *v.* Standard Oil Co., as authority for decree of dissolution upon the steel company.

> The similarity between its recital there of the past histories of the oil company and the tobacco company, and its latter recital of the history of the defendants in Stafford *v.* Wallace is too striking to be overlooked.[14]

In Stafford *v.* Wallace (258 U. S. 495) the Supreme Court held that the packers and stockyards act of 1921, providing for the regulation of packers and stockyards under the supervision of the Secretary of Agriculture, was constitutional. Emphasis was placed upon the following statement of the court:

> The packers and stockyards act of 1921 seeks to regulate the business of the packers done in interstate commerce and forbids them to engage in unfair, discriminatory or deceptive practice in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business. It constitutes the Secretary of Agriculture a tribunal to hear complaints and make findings thereon and to order the packers to cease any forbidden practice.[15]

Therefore it is argued there is sufficient legal machinery to regulate the packers through the packers and stockyards act which was passed by the Congress subsequent to the consent decree. The Government's reply to the packers argument was that the packers and stockyards act was enacted not in substitution for, but in supplementation of, the decree, as is indicated by a series of Senate resolutions, the latest being Senate Resolution 275, Seventy-first Congress, second session, May 26, 1930, which called for information relating to the enforcement of the consent decree.[16]

It is of interest to note that the first and most important movement instituted under the terms of the packers and stockyards act, filed in 1923 against Armour & Co. et al as a result of the absorption of Morris & Co. by Armour, resulted in a clean bill of health for the packers by

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[11] Brief of Swift & Co., op. cit., p. 11.
[12] U. S. Reports 221, pp. 1–106.
[13] Brief of Swift & Co., op. cit., p. 19.
[14] Brief for the United States, op. cit., p. 96.
[15] Ibid., p. 148.
[16] Ibid., pp. 91–92.

Secretary of Agriculture Jardine.[17] It may be concluded that the packers, now in open rebellion against the consent decree, have little fear of restrictive measures under the packers and stockyards act in view of the Secretary's decision.

The packers in further support of their argument for modification referred to the decision of the Interstate Commerce Commission in 1921 (62 I. C. C., 375), filed prior to entry of the consent decree, to the effect that packer use of refrigerator cars, especially route cars does not afford them any illegal or unfair advantage. The Government offered in rebuttal the proposition that the commission's decision dealt with the questions presented purely from a transportation standpoint. The commission, the attorneys said, does not enforce antitrust law, and it has the power to authorize railroads to do certain acts which, but for the authority of the commission, would be in violation of antitrust law. The commission held that—

> While question of size and economic advantage are of no significance to the Interstate Commerce Commission in dealing with a strictly transportation question, they are of immense significance to the Department of Justice and the courts in dealing with an antitrust question. Conditions apparently innocent in themselves may, when linked in a concatenation of other circumstances become an important and deciding factor in an attempt or tendency toward monopoly.[18]

Again resorting to legal precedent to prove that there is no monopoly in the meat-packing industry, the attorneys for the packers cited the decision of the United States Supreme Court in Wolf Packing Co. *v.* Court of Industrial Relations of the State of Kansas (262 U. S. 522) holding the act unconstitutional. The court, it was pointed out, declared:

> There is no monopoly in the preparation of food—food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are country wide, a short supply is not likely, and the danger from local monopolistic control less than ever.[19]

The answer of the Government was that it is conceded that there is now no monopoly in the meat-packing industry and therefore the case has no bearing upon the packers' case.[20]

The packers cited three cases of changes in the law since the entry of the consent decree which they said justify modification.

The changes are:

1. The decision of the Interstate Commerce Commission in National Wholesale Grocers' Association *v.* Director General et al. 1921 (62 I. C. C. 375), to the effect that the use of packer route cars did not afford a discriminatory advantage against wholesale grocers.
2. The enactment of the packers and stockyards act of 1921.
3. The decision of the Supreme Court in United States *v.* United States Steel Corporation. (251 U. S. 417) March 1, 1920.

Economic factors are of especial significance in the consent decree controversy. Scores of economists, practical as well as theoretically-minded men, were placed on the witness stand during the trial. The testimony of witnesses and subsequent arguments by the attorneys are replete with allusions to such subjects as "the versatility and diversification of inedible by-products"; the question of the "chain system as a buffer to monopolistic tendencies"; the "integration

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[17] Brief of Swift & Co., op. cit., pp. 76–77.
[18] Brief for the United States, op. cit., pp. 90–91.
[19] Petitioning defendants' statement of case, Swift & Co., et al., op. cit., p. 149.
[20] Brief for the United States, op. cit., p. 97.

movement in food manufacture and distribution"; "the significance of the brand-conscious age"; the "change in character of the distribution stream"; "the probable economic effects of the new Birdseye Patent speed-in-freezing process," which incidentally was recently sold to General Foods Corporation for $22,000,000.[21] These are only a few samples of the economic problems propounded in the Supreme Court of the District of Columbia at the trial. The whole field of economic policies of manufacture, distribution and consumption was covered in the most recent legal quarrel over the consent decree.

Foremost in the list of subjects discussed by the packers and their opponents is the question of the chain stores. Figures and statistics showing the amazing growth of this system were submitted to the court. The packers asserted that under present conditions of chain distribution a monopoly in the food industry by the packers is an impossibility. They pointed to the fact that whereas in 1920 there were 15,000 regular chain grocery stores with sales of $770,000,000, in 1929 there were approximately 60,000 grocery chains with sales of $3,500,000,000. During this period the leading chain groceries increased their sales 255 per cent while the sales of the leading wholesale groceries actually declined; in 18 of the 24 largest cities of the United States the chains are doing more than one-half of the retail grocery business; in 10 of the largest cities they do 56.4 per cent of the business; and in the entire United States they do in excess of 40 per cent of the total grocery business.[22]

The grocery chains since 1920, witnesses for the packers alleged, have entered the business of manufacturing and dealing in meat products, livestock products, butter, cheese, eggs, and poultry, and are tending toward a plan of both manufacturing and wholesaling of products, at least to the extent of their own requirements, leaving the packers uncertain as to retail outlets for the output of their plants. Witnesses testified further that these grocery chains are also entering such manufacturing fields as canneries, bottling works, roasting coffee, milk condensers, and manufacturing salad dressing;[23] while the packers are restrained from entering any of these fields and many others by the consent decree.

The point of the packers' agrument concerning the chain system is that whereas the distributing stream was formerly manufacturer-jobber-retailer-consumer, to-day the jobber is being rapidly eliminated and the new stream is manufacturer-retailer-consumer. Thus by the consolidation of retail outlets in the hands of regular and voluntary chain-store organizations and the concentration of control in the sale of manufactured food products, a serious menace has arisen to the packers' business.

Specifically the packers' arguments for modification on the basis of the chains' competition are as follows:

1. That as large buyers at wholesale of meat products handled by them, chains have acquired such buying power in the meat industry as to be a menace to petitioners' marketing position.
2. That for self-protection against this buying power, petitioners themselves must go into the retail meat business.
3. That the retail meat business alone is no longer desirable, since the purchasing public insists on buying meats and groceries in the same stores.

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[21] Brief for the United States, op. cit., pp. 73–74.
[22] Petitioning defendants statement of case, Swift & Co., et al., op. cit., pp. 18–21.
[23] Ibid., pp. 30–32.

4. That the petitioners must, therefore, also go into the retail grocery business.
5. That, if they do so the power and position of the chain stores may be relied upon as factors among others to prevent any tendency toward monopolistic conditions as a result.

In reply to these arguments the Government submitted for the consideration of the court three questions as follows:

1. To what extent do the chains really compete with the petitioners in the slaughtering and meat-packing business.
2. What does their power amount to as buyers of petitioners' products compared with their other customers and trade.
3. To what extent can chains be relied upon as a buffer to petitioners' monopolistic tendencies, in case modification should be granted? [24]

The Government ventured the prediction that by a merger of chains and packers, (regarded as a possible natural development if the consent decree should be modified) the problem of chain store entry in the packing business would be solved in the packers' favor, while packer competition in the grocery trade would disappear as against the combining chains, and any menace which either now holds for the other would become a source of strength. Such a combination securing further power from the use of the quick freezing patent control could undersell competing retailers, independent and chain, both in meats and groceries. The statement was made that the elimination of the major portion of existing retail meat dealers is one of the avowed purposes of modification of the consent decree. Where 1,000 chains now control 10 per cent of the retail meat trade, the two large packers, by simply holding their own would control 50 per cent of the trade, at least so far as that trade supplies its needs in interstate commerce.[25]

Quoting from statistics taken from the Census of Manufactures for 1927 showing 49,787 separate establishments engaged in the production of food and a wholesale value at factory of over $11,000,000,000, and costing the Nation's population $24,000,000,000 annually, the packers made the broad assertion that the magnitude of the food industry in itself suggests the impossibility of monopoly therein. They declared:

> The food industry is not only of great magnitude from a standpoint of value of production, but it is also of great magnitude from a territorial aspect. * * * In the nature of things food must be produced in all sections of the country and must be produced from year to year and from season to season. The commodity is perishable and the Nation lives upon daily supplies and not upon accumulated reserves.[26]

The so-called integration movement, exemplified by such firms as Standard Brands (Inc.), and General Products Corporation, came in for much discussion, the packers pointing out that during the last 10 years there has been a revolutionary tendency—

(1) To carry goods all the way through from the raw material state to the retail store without transfer of ownership.

(2) To diversify the products offered by food manufacturers, wholesalers and retailers.

(3) To give greater and greater recognition to the importance and development of branded food products than ever before.[27]

The packers described this movement as one possessing valuable features of self-production against the purchasing power of the chain

[24] Brief for the United States, op. cit. pp. 10-11.
[25] Ibid, p. 112.
[26] Petitioner defendants statement of case, Swift & Co. et al., op. cit., p. 97.
[27] Ibid., pp. 422-23.

stores and cited analyses of a number of concerns to prove their point. The Government examined the list of alleged "integrators" submitted, and observed that the packers "are not entitled to claim as against the consent decree, the right to integrate merely because others enjoy it," citing the decision of the Supreme Court in Swift & Co. et al. *v.* United States (276 U. S. 311), that the exclusion of petitioner from a business lawful for others was within the proper limitation of judicial power where the pursuit of such business was one of a chain of circumstances which together constituted a threat of monopoly.[28]

As brought out in a previous chapter the threat of packer activity in the sale of so-called "unrelated lines" on a large scale was an important factor in the decision of the Government to secure the consent decree in 1920. By that decreee the big packers were restrained "perpetually," as Mr. Palmer declared, from carrying on any business in a specified list of commodities including fish, vegetables, fruits, confectionery, soft drinks, molasses, spices, sauces, coffee, tea, chocolate, nuts, flour, sugar, rice, cereals, and grape juice.

Although the records of the court show, according to the Government, that this stipulation has never been completely complied with by the packers because of alleged difficulties in taking the inventories of these unrelated lines, the expressed desire of the packers to go into the unrelated line business without restriction constitutes one of the major factors of the petition for modification of the consent decree. One of the chief reasons given by the packers is the desire to use more effectively their distribution system consisting of great fleets of refrigerator cars; another is to meet the alleged growing competition of the chain stores which, it was argued, are not restricted in the sale of a wide variety of food products. Grocery chains, it was alleged, are selling cigars; cigar chains are selling candy and drugs, and drug stores are disposing of foods across the counters. The consent decree, it was declared, prohibits the packers from participating in the new highly competitive distribution movement, from integrating in line with the modern trend, from developing "brands," from fully applying mass production and mass selling principles and to this extent the decree is oppressive and also lessens competition to the injury of the public interest.

In other words the case against the packers, according to their attorneys, no longer involves the question of monopoly and possible restraint of trade. If there was ever any such danger it has been entirely removed by changing conditions of production and distribution. The consent decree, instead of preserving competition, is actually a menace to it because of this change in the "stream of commerce." Destroy this decree and thereby increase competition in the public interest is the argument.

The alleged changed conditions of production and distribution, which constitute the chief argument of the packers for modification, may be summarized as follows:

1. Growth of the chain-store movement (integral and voluntary), with its entry to some extent into the retail meat business on the one hand and the slaughtering and meat-packing business on the other.

[28] Brief for the United States, op. cit., p. 28.

2. The growth of the integration movement among food manufacturers, with attendant diversification of products and development of brands.

3. The entry of defendants' packer competitors to some extent into the retail meat business and the handling of unrelated lines free from the restrictions of the consent decree.

4. The size and proportions of Swift and Armour business in the meat-packing industry.

5. Increased competition in the slaughtering and meat-packing business.

(*a*) Increased number of small packers.

(*b*) General existence of "keen and clean" competition.

6. Physical facilities for distribution, including—

(*a*) Motor transportation and good roads.

(*b*) Branch house facilities.

(*c*) Refrigerator cars.

7. The imminence of the quick-freezing process, and its effect on the manufacture and distribution of meat and other food products.

8. Satisfactory character of stockyard services on packer-owned stockyards.[29]

In rebuttal the Government charged that the packers had failed to submit proof of the alleged changes since entry of the consent decree and declared that the cause, danger, and fears of monopoly existing in 1920 have not been dissipated. In support of these arguments the Government submitted that—

(1) Chains participation in the meat-packing industry is negligible and trivial.

(2) Chain stores are unimportant as dangerous factors in the market in which packers sell their products.

(3) Food integrators do not possess advantages over packers.

(4) Non-defendant packers' activities in the retailing of their own products is negligible as far as packers' markets are concerned.

(5) Packers' business in proportion to total business of their industry has not substantially changed since 1920 though the decree of control has changed in the direction of further concentration through merger of Morris & Co. with Armour.[30]

The Government concluded that there is grave doubt as to whether extent of packers coercive and collusive competition practices and domination of their industry and use of strength in one line to promote their business in others has abated since 1920.

Furthermore the Government submitted that danger of modification has been affirmatively shown and the following possible ways in which the packers may employ liberties of modification were enumerated as follows:

(1) No use will be made of them.

(2) No active use will be made of them, immediately at least but their possession will be held before the eyes of those with whom petitioners deal, to exact business arrangements more advantageous to the latter.

(3) Their actual use will be limited to the handling of unrelated lines of wholesale.

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[29] Brief for the United States, op. cit., pp. 8–9.
[30] Ibid., pp. 98–100.

(4) Their actual use will extend to the handling of meats and groceries in combination stores at retail.[31]

Finally the Government summarized its reasons for believing that the danger of monopoly would be restored by modification of the decree as follows:

(1) The economic principle—so simple that we may call it a principle of human nature—that people buy where they can buy most cheaply, the products in question being otherwise equally or more desirable. (Seligman, Principles of Economics, 10th Ed. (1923), p. 247.)

(2) The collection of conditions and circumstances presented in evidence and hereinbefore analyzed, showing that the petitioners, as retailers of meats and groceries can sell them more cheaply than their respective competitors.

(3) That the reasons for this ability lie not in any intrinsic superiority of mechanical process of technique, but in factors which in every case are especially related to petitioners' size, and their proposed combination of packing house and unrelated lines, affording them, in the handling of both, advantages in cost not available to their separate competitors in either.

(4) In petitioners' willingness to employ collusive and coercive tactics in competition, and to use their large control in certain lines to promote their interests in others.

(5) The apprehension warranted by the natural self-interest of all concerned, that the petitioners will acquire some measure of exclusive patent control over the quick-freezing process of food manufacture and distribution, to the further disadvantage of their manufacturing and distributing competitors not so favored.

(6) Petitioners' present position of industrial dominance and leadership, both because of their size and power in the meat packing industry and because of the volume of their business and importance of their operations in numerous and diverse other lines of production.[32]

VIII. CONCLUSIONS

The 10-year struggle between the big packers, with their enormous resources and magnificent distributing system, and some five thousand and odd wholesale grocers epitomizes a long fight that has been waged in this country between two great groups, one holding to the theory that the greatest social happiness and economic prosperity can come only from free competition, the other believing that consolidations and mergers will provide the solution for our social and economic ills. The popular "trust bursting" of the nineties within recent years has been thrust into the background and in its place there has been substituted the idea of a highly efficient and benevolent big business. No less an authority upon the economic trends of the Nation than the late Chief Justice Taft has this to say:

> The antitrust law * * * was not to interfere with a great volume of capital, which concentrated under one organization, reduced the cost of production, and made its profits thereby and took no advantage of its size by methods akin to duress to stifle competition with it. I wish to make this distinction as emphatic as possible, because I conceive that nothing could happen more de-

[31] Brief for the United States, op. cit., p. 101.
[32] Ibid., pp. 113–114.

structive of the prosperity of this country than the loss of that great economy in production which has been and will be effected in all manufacturing lines by the employment of large capital under one management.[1]

This concept has been developed in actual practice in hundreds of ways. There have been mergers of grocery and novelty stores, great power concerns, moving pictures, drug stores, and newspapers. "Canned editorials" appear simultaneously in scores of chain newspaper systems throughout the Nation. Often these editorials have betrayed the hand of great monopolistic special interests. Even the churches and the Sunday schools have felt the pull, and to-day a gigantic scheme, approved by the President, has been formulated to consolidate the great railroad systems of the country into a few lines. The housewife on Main Street has been led to believe that the chain store will bring about a substantial reduction in her grocery bill by the omission of a penny here and a nickel there. She has therefore, without apparent regret, seen the husband of her lifelong friend and neighbor, keeper of the "corner grocery," who extended credit and delivered also, forced out of his business by the chain-store man who is a nonresident and whose headquarters is in one of the great eastern cities, and who, incidentally, neither makes deliveries nor extends credit. Thousands of independent small-town grocery merchants in the United States, generally regarded as among the substantial citizens of their respective communities, have joined the ranks of clerks, in the employ of the great chains.

The big packers, it may be said to their credit, if one is an exponent of the righteousness of the big-business theory, were sturdy pioneers in this twentieth century movement. As has been already pointed out, several decades ago three or four families, the Armours, the Swifts, the Sulzbergers, by means of accumulated capital, and (it must not be lost sight of) ingenuity and initiative, started the development of their great packing concerns by enlarging a plant here, buying another there, by taking over stockyards and building refrigerator and peddler cars, and by other methods of combination. By 1917 these five concerns had increased their proportion of the total United States inspected slaughter of animals from 59.7 per cent (1908) to 70.5, whereas the independent packers killed only 29.5.[2]

In many ways it was a natural development made possible largely by unlimited capital resources out of which was built a great private system of distribution which popularized packer products and brought the packer within earshot of the consumer.

"Nothing succeeds like success." The packers' big-business system must be made bigger, it was decided prior to our entrance into the World War. If the people would not eat more of the packers' meats, they would eat his catsup, his vegetables, his fish, his rolled oats, and they would drink his coffee. A great distribution system for the sake of economy must be used to the utmost. Big business for the first time entered the general foodstuffs field. The packers launched into the manufacture, purchase, and sale of a large variety of articles of human consumption unrelated to the packing industry. This, the proponents of the competitive concept said was merger upon merger. Big business was at last making an assault on the Nation's

[1] Taft, Wm. H., The Antitrust Law and the Supreme Court, p. 112.
[2] U. S. Senate Document 219, op. cit., p. 17.

food supply. Some 6,000 wholesale grocers, with an army of employees who were voting and taxpaying citizens of their respective communities, rose up in arms. The packers' splendid system of peddler and refrigerator cars literally combed the Nation in the distribution of food products. The new competitive system in food sales would soon bring an end to all competition, it was argued, leaving alone in the field a food colossus—the four or five big packers—in control of the Nation's food distribution. The significance of such a program may be observed in the fact that the slaughtering and meat-packing business already heads the list of the Nation's six industries.[3]

The thrust of the packers into the unrelated food lines played an important part in the formulation and entry of the packers consent decree in 1920. There were numerous complaints against the packers. If they would get out of the "unrelated" business, however, and confine their activities to slaughtering and selling meat, the wholesalers would not complain. Furthermore, the livestock men would be satisfied with the plan for the divorcement of the packers from the stockyards. The consent decree, therefore, provided primarily that the packing companies should not own any interest in public stockyards, stockyard terminal railroads, or market newspapers; nor should they have any interest in public cold storage warehouses except in stockyard cities where they operate packing plants; and they should not engage in the manufacture or distribution of any of a list of named commodities unrelated to the meat business, chiefly those which came under the class of groceries; nor should they own or operate any retail meat markets except at stockyards; and they should not handle fresh milk and cream except for purposes of manufacture in the butter, cheese, and other dairy products which they were permitted to handle.

Ten years of defensive legal warfare has been waged to keep the big packers in the position which they voluntarily agreed to assume in 1920. The narrative of the court battles recounted in preceding chapters, to the lay mind at least, is not an affair in which the thoughtful citizen (regardless of his attitude toward the packers) may take pride. Every known legal device (and they appear to be legion) has been attempted to void the court decree, and with more or less success through methods of delay and suspension of the operation of the terms of the decree by court order. There have been indications from time to time that the Government department in charge of the enforcement of the law was perhaps not particularly enthusiastic about the decree which was initiated by this department. It should be noted, however, that the administration of the department has been radically changed within the last 10 years. The decree was secured under a Democratic administration. Proposed modification of the decree has been made a matter for the court to decide under a Republican administration. Perhaps this is only another example of the inevitable tendency of a democracy to change and even reverse itself within short periods of time.

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[3] The six leading industries are:

Slaughtering and meat packing	$3,057,000,000
Motor vehicles	2,848,000,000
Iron and Steel	2,779,000,000
Printing and publishing	2,507,000,000
Foundry and machine-shop products	2,259,000,000
Petroleum refining	2,142,000,000

To-day we find the battle lines, heretofore formed largely by the big packers and the 6,000 wholesalers, broadened into a great battle front with some 350,000 retailers and millions of consumers involuntarily drafted into the ranks. Farmers and livestock men have been enlisted under the banner of packer and wholesaler. The line-up of opposing forces present a unique situation. The wholesalers are opposing the packers; the packers, on the other hand, oppose the chain systems; the chain systems are opposed by the tens of thousands of small independent merchants who support the wholesalers; while the 120,000,000 consumers grope in this direction and that in their efforts to secure good food products at reasonable prices.

The question of the decree is no longer one of mere validity. The Supreme Court of the United States settled that question some two years ago in its action upon the motions of Swift and Armour to vacate. The problem to-day transcends a mere consent decree. It is one of far-reaching importance relating to the political, social, and economic fabric of American institutions. In the last analysis, the issue is big business control versus small business competition.

Shall the four big packers, dominated by two packers, Armour and Swift, with their enormous wealth, be permitted to attain their "manifest destiny" in this age of consolidation and big business units? Such a course, the packers say, is for the benefit of the great consuming public of the Nation by the standardization of products and the reduction of costs through direct sales by packer to consumer. The basis of their present plea, which was heard in the Supreme Court of the District of Columbia in October and November, 1930, is that the decree is economically unnecessary, unfair, and unsound. The packers have reached far beyond their original program argument, for retailing direct to the consumer was not desired by them at the time of the entry of the consent decree. To-day the retailing plan is one of the outstanding features of the appeal for modification.

Opponents of a further spread of packer activities through modification of the consent decree profess to see a plan of nation-wide alliance between the national packers and national chain stores. Quoting the National Bureau of Economic Research, The Peoples' Lobby, with headquarters in Washington, points out that within a year or two the value of a few staple commodities namely, fresh meat, canned meat, fruits, and vegetables, dairy products, eggs, poultry, and fish, all of which the packers are prepared to sell, will cost $10,000,000,000, or over one-sixth of the total value of all commodities retailed.

According to the Peoples' Lobby—

> Expedited service such as the Big Four meat packers have received for their refrigerator cars will give these Big Four packers an unprecedented advantage in handling and selling these staple foods. A merger with one or more of the big chain groceries will be almost inevitable—a vertical trust from sow to sausage, from steer to steak, from calf to slipper, from plantation to coffee pot, from rye to bran, from wheat to wheatena.

Seven great chain systems, namely the A. & P., Kroger, American, First National, Safeway, National Tea, MacMarr in 1929 operated 34,300 grocery stores, and the five leading chains had more than half of the total grocery chains of the country.[4] In this connection it is

[4] American Wholesale Grocers Association, Bulletin No. 1555.

charged by the wholesale grocers that the big packers to-day are getting 75 per cent of the meat business of the chains which receive regularly from the packers a price advantage of 2 to 3 cents per pound regardless of fluctuation of cost of production, in order to shut out the independent packers. The nucleus of the alliance between packer and chain, it is predicted, will be the seven great systems controlling more than 30,000 stores. After condemning packer retailing and chain store packers, Mr. Lewis F. Swift, president of Swift & Co., on February 1, 1930, had this to say:

> I believe far better results could be achieved through intelligent cooperation between the great wholesale and retail distributing agencies.[5]

With a working capital of $350,000,000, with annual net sales of meat and a few relating lines amounting to nearly $2,500,000,000, with control of more than 17,000 refrigerator and peddler cars, and with well-equipped branch houses in practically every town of any importance in the country, it is conceivable that any modification of the decree is a matter of no small significance in the production and distribution systems of the Nation. While the expansion of the packers' business through modification of the decree would probably result in better distribution of standardized food products, there is no guaranty that the practice would result in lower costs to the public. In this connection one may ponder upon the words of Attorney General Palmer relative to the question of monopoly (quoted above and merely repeated here):

> The result was that the consumer profited temporarily but ultimately and finally paid the price. It worked exactly as all other systems of that kind work. They had the ability to undersell their competitors and they would undersell them long enough to drive them out of the market.

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[5] American Wholesale Grocers, op. cit.

APPENDIX

Since completion of Chapters VII and VIII in which the issues before the Supreme Court of the District of Columbia in the recent hearings on the packers consent decree (October–November, 1930) were described and conclusions outlined, the court has directed that the consent decree shall be so modified as to permit the national packers to manufacture, sell, and wholesale so-called unrelated food products and to use their distribution facilities in handling these lines. The petition of the packers to extend modification of the decree to include retailing was denied. The packers were also ordered to dispose of their stockyards before December 31, 1931.

Justice Jennings Bailey delivered the opinion of the court in a 7,000-word judgment on January 5, 1931. The formal order modifying the consent decree was signed by the justice during the week of January 25, 1931. A few days before the signing of the order, a representative of the wholesale grocers who have opposed modification, wrote two letters, one to Attorney General Mitchell and the other to President Hoover. In the letter to the Attorney General inquiry was made as to whether or not the Government proposed to appeal from the decision of the Supreme Court of the District of Columbia. In the letter to the President, dated January 26, 1931, the wholesale grocer representative, Benjamin C. Marsh, stated:

> In view of the indefiniteness of the position of the Attorney General, we earnestly request that you will take this matter up with him. No one could have more specifically indicated the practices of the big meat packers than you did in your letter of 1928 to the then President Wilson. Leopards change their spots about as frequently as the meat packers their practices. The recent record of violations of the pure food and drug act by the big meat packers is disgusting and disheartening evidence that they still seem incapable of regarding the public as anything except a God-given opportunity for exploitation.

While the Government has not made a move, nor stated its intentions at this writing (February 4, 1931), the letters from the representative of the wholesale grocers would indicate that the matter is not closed. In the event of failure of the Government to contest the order modifying the consent decree it is understood that the enactment of legislation in Congress will be attempted.

It is of interest to recall that the consent decree was agreed to by the packers in 1920 in order to forestall the passage of threatened legislation regarded by the packers as adverse to their interests. In 1931 it appears likely that the national legislators may attempt legislation to forestall the effects of modification of the decree. Thus we have a unique modern example of the historic conflict between the judicial and legislative branches of the Government.

Comments upon the order of modification by representatives of the Government and of the packers are significant. John Lord O'Brian of the Department of Justice declared that the main contention of the Government in opposing modification of the consent decree was to prevent the large packers from entering the retail field.

On this point the court held with the Government. Frank J. Hogan, chief counsel for the packers, declared that the modification order will enable the packers to carry on a general foods business, using their vast distributive systems, which has been the chief aim of the packers. It would appear therefore, that Justice Bailey has handed down a decision which is remarkable in court annals, in that the decision is pleasing to both petitioner and defendants.

The high points of this unique and far-reaching decision may be summarized as follows:

1. The consent decree of 1920 is valid and binding upon the parties, and the only ground upon which modification can be had is that conditions have so changed since its entry as to render it inequitable to further enforce certain of its provisions.

2. It is conceded that there is to-day no monopoly in the meat packing industry, four big packers, defendants, being independently owned and controlled and in active competition in the purchase and sale of livestock and the sale of meat products.

3. The court agrees with the Government that monopoly of food and meat commodities in interstate commerce may exist, although monopoly of the packing business and foods as a whole be impossible. If the latter is prevented, the former will be more difficult.

4. It is clear that none of the defendant packers is making large profits as compared with other dealers in food including the great chain systems. One usual concomitant of a monopoly, i. e., vast profits in proportion to its business, does not exist on the part of any of the defendant packers.

5. The packers have exaggerated the dangers of the chain system, for there is constant and keen competition, and the size of chains do not give them any unfair advantages over the packers.

6. The imminent development of the quick-freezing process will largely do away with the necessity of any immediate disposition of perishable products.

7. Size alone is not an offense, as held by the United States Supreme Court in the Steel case (251 U. S. 429) and no one of defendant packers has anything like control of business.

8. There exists no real combination or agreements in restraint of interstate commerce between the defendant packers or any of them, and no monopoly nor unfair competition nor agreements in restraint of trade save in sporadic instances.

9. It is conceded that the supply of refrigerator cars is ample and private ownership of such cars has never been forbidden by law or by the Interstate Commerce Commission. The great development in recent years of hard surface roads has greatly diminished any advantage in ownership or use of refrigerator cars, increasing the power of smaller packer to compete with larger packer.

10. The entire change of conditions in the distribution of foods, economic changes in the conditions and practices of packers, and changes in the statutes and laws must be considered and if by reason of those changes, any provision of the decree can be modified without danger of monopoly, or the probability of acts in restraint of trade or unfair practices on the part of the petitioner, then the decree should be modified.

11. Court sees no danger of monopoly on part of defendants arising from use of refrigerator cars and from dealing in commodities other than meats.

12. The control by the defendants of the great amount of interstate commerce in meats and other articles from the producer to the consumer would probably result in the almost complete annihilation of the independent retail grocer, already a minority in volume of business.

13. Whether complete integration in merchandizing from the producer to the consumer would produce better conditions as a whole is an economic question which is not for the court to decide.

14. Decree is therefore modified so as to permit the defendant packers to manufacture, sell, and deal in unrelated lines and to use or permit others to use the distribution facilities of the defendants in handling these unrelated lines, but in all other respects the decree will remain in full force and effect and the defendants required to comply promptly with the decree in every respect in which they have not heretofore complied with it.

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